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Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

Filed Mar. 16, 1897.

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The Louisville Trust Company, - - - *Appellant,*

VERSUS { No. 646.

The Louisville, New Albany & Chicago Railway Company, - - - *Appellee.*

The Louisville Banking Company, - - *Appellant,*

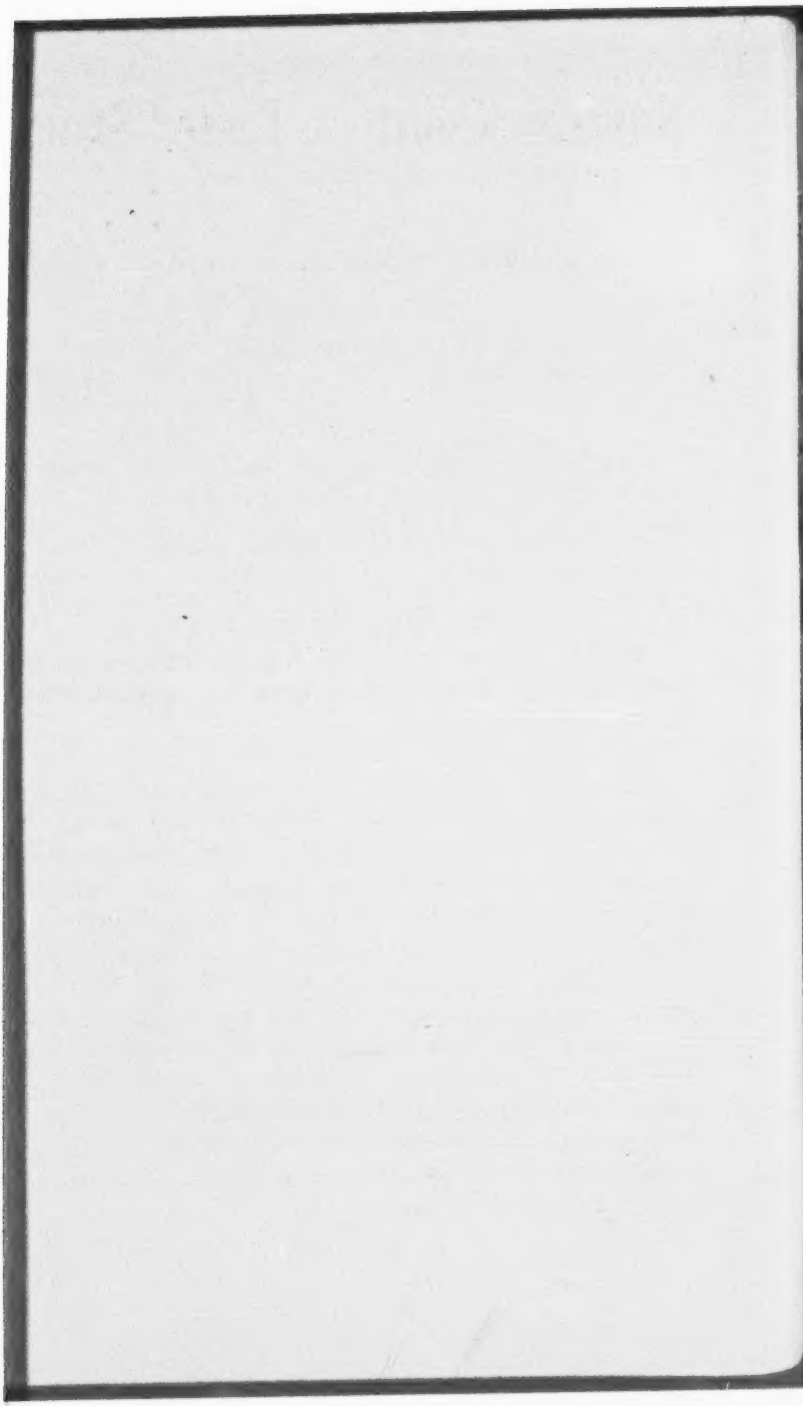
VERSUS { No. 646.

The Louisville, New Albany & Chicago Railway Company, - - - - - - - - *Appellee.*

BRIEF BY APPELLANTS ON MOTION OF APPELLEE FOR AN ORDER DIRECTING CIRCUIT COURT TO VACATE ORDER DISMISSING APPELLEE'S BILL.

SWAGAR SHERLEY,
ST. JOHN BOYLE,
ALEX. P. HUMPHREY,
GEO. M. DAVIE,
SHACKELFORD MILLER,
COUNSEL FOR APPELLANTS.

JOHN P. MORTON & COMPANY, LOUISVILLE, KY



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

THE LOUISVILLE TRUST COMPANY, - - - - - *Appellant,*

Versus { No. 645.

THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, - - - - - - - - - - - *Appellee.*

THE LOUISVILLE BANKING COMPANY, - - - *Appellant,*

Versus { No. 646.

THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, - - - - - - - - - - - *Appellee.*

Brief by Appellants on Motion of Appellee for an Order directing Circuit Court to vacate Order dismissing Appellee's Bill.

Those portions of the record and the other facts that are necessary to a consideration of the motion are fully set out by counsel for appellee in their brief, and will not therefore be here repeated. It may be well to state, however, that the order of the Circuit Court entered in obedience to the mandate of the Circuit Court of Appeals, dismissing the bill of appellee, also, of necessity, dissolved the injunction that the Circuit Court had granted, restraining the appellants from suing the appellee on its guaranty, and which guaranty the bill of appellee was brought to have cancelled. This is why the present motion is made, and not because of any fear lest the mandate of this court would be ineffective by reason of the dismissal by the Circuit Court of appellee's bill, should this court reverse the decision of the Circuit Court of Appeals.

I.

The issuance of the writ of certiorari by this court did not eliminate the decision of the Circuit Court of Appeals, nor affect any action of that court made prior to the writ's issuance.

It is contended by counsel for appellee in support of the present motion, that the granting of the writ of *certiorari* by this court has the effect of wiping out the entire action of the Circuit Court of Appeals, and that therefore the judgment of the Circuit Court granting the prayer of the bill, and enjoining the appellants, should remain in force until this court has finally passed upon the merits of the case.

The second paragraph of Section 6 of the Circuit Court of Appeals act provides:

> "And excepting also that in any such case as is hereinbefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require by *certiorari* or otherwise any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

The evident meaning of the above enactment is shown by the remainder of the section, where an appeal or writ of error in other cases exists as a matter of right; the only difference between the two classes of cases being that in the former it is optional with this court to give a hearing, while in the latter it is a matter of right.

Section 10 of said act treats the cases that come by appeal or writ of error from the Circuit Court of Appeals to the Supreme Court, and those that come by *certiorari*, as to their being remanded to the Circuit Court, exactly alike, so that whatever

argument might be drawn from that section to indicate the elimination of the Circuit Court of Appeals in cases like the one at bar, applies with equal force to the other class of cases that go to this court by appeal or writ of error, and, of course, that is manifestly absurd. If this be true, the rights of the appellee are the same as if the case was here by appeal or writ of error, and certainly in such a case the judgment of the Circuit Court of Appeals would remain in full force until a decision by this court on the merits, notwithstanding a supersedeas had been obtained. In the "Slaughter House Cases," 10 Wal. 273, this court said:

> "Neither does an appeal from an order dissolving an injunction suspend the operation of the order so as to entitle the appellant to stay the proceedings pending the appeal as matter of right, either in a suit at law or in equity."

And in those cases it was held that the order of the Supreme Court of Louisiana dissolving the injunction of the plaintiffs in error was not annulled by a writ of error to this court, notwithstanding plaintiffs in error had complied with all the requirements of the 23d section of the Judiciary Act as to a supersedeas. The same rule was laid down in Hovey v. McDonald, 109 U. S. 161, and Leonard v. Ozark Land Co., 115 U. S. 465. In 4 Dana (Ky.) 599, Runyon *et al.* v. Bennett, the Court, through Judge Marshall, said:

> "A supersedeas suspends the efficacy of a judgment, but does not, like a reversal, annul the judgment itself. Its object and effect are to stay future proceedings, and not to undo what is already done. It has no retroactive operation so as to deprive the judgment of its force and authority from the beginning, but only suspends them after and while it is itself effectual. A consequence of this is, that whatever is done under the judgment, after and while it is superseded, being done without authority from the judgment, which is then powerless, and against the authority and mandate of the supersedeas, should be set aside as improperly and irregularly done, but that whatever is done according to the judgment, before the supersedeas takes effect, is upheld by the authority of the judgment, and is not overreached by the supersedeas."

II.

A writ of certiorari operates as a supersedeas only from the time of its service.

As was said in the case of Ewing v. Thompson, 43 Pa. St. 372, "the writ of *certiorari* is not in itself a writ of supersedeas, but it operates as one by implication." This is the result of the theory of the law, that the actual record of the inferior court is certified up to the higher tribunal, though in fact only a certified copy is sent.

After the writ is issued, in the eyes of the law, there remains nothing concerning which the inferior court can act. It necessarily follows that there can be no supersedeas until the writ is served on the lower court, and all acts done prior to that time are valid, and, indeed, where an execution has been issued to an officer before the writ of *certiorari* is served, the execution will not be recalled, and the sheriff is not guilty of contempt in proceeding to execute it.

In the case of McWilliams v. King and Phillips, 32 N. J. L. 23, the following cases are cited as illustrations of the procedure at common law:

> "In Prince v. Allington, Moore, 677, it is said that if justices of the peace receive a *certiorari*, all that they do after is erroneous, but what the sheriff does after, on a warrant received before, is not erroneous, and yet their negligence (that is, the negligence of the justices) is punishable by attachment as contempt. And in King v. Spilman, 1 Keb. 93, pl. 79, the court, sustaining the same doctrine, remarks that the hands of the justices are closed by the issuing of the *certiorari*, though they be not in contempt for what they have done before the delivery of it, but they ought to have awarded a supersedeas immediately upon the receipt of the *certiorari*. And the same principle was still more distinctly presented in Regina v. Nash, 1 Salk. 147, the second reso-

> lution of the court being embodied in these words: 'That this court had no power over the warrant, being granted before the *certiorari* issued, and therefore they refused to make a rule upon the constable to return it.' To the same effect are the following authorities: 2 Hawk. P. C. 293; Bacon's Ab., Certiorari G; F. N. B. 237."

In Gaertner v. The City of Fond du Lac, &c., 34 Wis. 503, it is said:

> "The general rule is that a *certiorari* to a subordinate tribunal operates as a stay of proceedings from the time of its service, unless the judgment or order complained of has begun to be executed."

Not only is an execution in the hands of an officer not stayed, but also in the case of The City of Macon v. Shaw, 14 Ga. 164, it was said:

> "The granting of a *certiorari* does not revoke a judgment executed, or in process of execution. The effect of the writ, when allowed, is to stay all further action on the record, and its powers can not be extended by special order of the judge of the Superior Court."

See also 13 Wendell (N. Y.), 664; 9 Johns. (N. Y.) 66; 3 Hill (N. Y.), 239.

As the mandate of the Circuit Court of Appeals was issued and obeyed before this Court granted a *certiorari*, the order dismissing the bill, can, we think, only be set aside as a result of a decision by this Court on the merits.

III.

The stipulation entered into by counsel for appellants and appellee had no other effect than to abridge the record.

The point made by counsel on the stipulation entered into herein is so extraordinary and of such doubtful ethical nature that we feel disposed to ignore it entirely were it not for the

extreme complacency with which counsel disaffirm any intention of "imputing any unfairness on the part of counsel (for appellants) in their subsequent insistance for judgment of dismissal upon the mandate of the Circuit Court of Appeals."

The agreement was entered into as a favor to counsel for appellee to save them the trouble, and it the expense of a complete transcript in each case when a special one in two of the cases would suffice. It was never supposed by any one that it could, in any way, affect the rights of the parties, and we are certain that not even the extraordinary ingenuity of counsel can twist it so as to have any such effect. The stipulation provides simply that two of the cases should be further contested, and that the result should be abided in as to the other cases, and the reason of the stipulation is given in these words:

> "For the reason that the pleadings and proceedings in the said two cases of the Louisville Trust Company, appellant, and the Louisville Banking Company, appellant, against the Louisville, New Albany & Chicago Railway Company, appellee, presents the full issues involved in this record."

There is nowhere an intimation that appellants should not insist on any and all rights they might have under the mandate of the Court of Appeals. There was no reason and no consideration for any waiver of rights, and none was made. The stipulation, as made, has been, and will be, kept in its entirety, but we shall vigorously protest against an unwarranted attempt to extend it to matters never embraced by it. We refrain from any further discussion of the stipulation, as it would serve only to dignify a very extraordinary contention.

IV.

The motion of appellee should be sustained, if at all, only on the condition of the execution of a bond.

We believe for the reasons already set forth, that the motion of appellee should be overruled, but desire to most strenuously insist that if it is sustained, it be on condition that a suitable bond be executed by appellee to each original appellant, conditioned to pay all damages that they may suffer by the continuance of the original injunction until the decision of this court on the merits, if such decision be an affirmance of the Court of Appeals. This court clearly possesses the right to require such a bond if it possess the right to sustain the motion of appellee. When an appeal was taken by appellants from the decision of the Circuit Court, a bond was given to prevent the cancellation of the guaranty, and for costs; the injunction of the Circuit Court remaining in effect.

If, after a hard-earned victory in the Court of Appeals, appellants are to remain still bound on their supersedeas bonds, with their hands still tied by injunction, while appellee disposes of its entire property by foreclosures, their victory in this court can be but a barren one. Surely they are entitled to a bond in their favor if they are to be prevented until it may be too late from asserting their claims against appellee.

Respectfully submitted.

SWAGAR SHERLEY,
ST. JOHN BOYLE,
ALEX. P. HUMPHREY,
GEO. M. DAVIE,
SHACKELFORD MILLER,
Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1897.

THE LOUISVILLE TRUST COMPANY, - - *Appellant,*

No. 254. *VERSUS*

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, - - - - - - - *Appellee.*

THE LOUISVILLE BANKING COMPANY, - - *Appellant,*

No. 255. *VERSUS*

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, - - - - - - - *Appellee.*

STATEMENT.

In 1889 the Louisville, New Albany & Chicago Railway Company, hereinafter called the "Monon," leased the railroad of the Louisville Southern Railroad Company, which railroad extended from Louisville to Lexington in Kentucky with a branch to Burgin, in Mercer County, Kentucky, on the line of the Cincinnati Southern. The Louisville Southern passed through Versailles, Ky., at which point there was then being constructed a railroad to Beattyville, Ky., where there were valuable coal fields. This company, the Richmond, Nicholasville, Irvine & Beattyville Railway Company (hereinafter called the Beattyville Company) had made a contract with the Ohio Valley Improve-

ment and Contract Company (hereinafter called the Contract Company), by which the said Contract Company had agreed to construct and equip the line of railroad. In consideration thereof the Railroad Company was to execute and issue to the Contract Company its first mortgage bonds at $25,000 per mile, to transfer to the Contract Company the subscriptions it had received from communities and counties, and also to issue to the Contract Company all of its capital stock except that which would have to be issued on account of such subscriptions.

Under these circumstances the Monon Railroad Company, desiring to obtain access to the coal fields of Eastern Kentucky, made an agreement with the Contract Company, which was then engaged in the work of construction, by which it undertook to guarantee the payment of the Beattyville Company's bonds in consideration of receiving three fourths of the entire capital stock of the Beattyville Company. (Exhibit C to Original Bill. Tr. 16.)

The work of construction proceeded, and as the bonds were delivered to the Contract Company *pari passu* with the work done, the Monon Company endorsed its guaranty upon such bonds and received the proportion of the capital stock to which it was entitled under its contract until they had endorsed the bonds to the amount of $1,185,000 and received $888,750 of the capital stock of the Beattyville Company. (The form of said guaranty will be set out later.) These bonds were then put upon the market by the Contract Company, and purchased by many persons and corporations in good faith and without knowledge of any irregularity or lack of power or authority on the part of the "Monon" to make the guaranty. (The appellant, Louisville Trust Company, is such a holder of 125 of these bonds, while the appellant, Louisville Banking Company, is as to some of its bonds a holder with knowledge of the facts.)

Shortly afterward, the management of the Monon Railroad Company was changed at a stockholders' meeting; after which the new management repudiated the agreement to guarantee the

bonds, and on April 9, 1890, brought its bill of complaint in this cause for the purpose of canceling its contract with the Contract Company and its endorsement already placed upon the bonds.

The original bill which was filed in the Circuit Court of the United States for the District of Kentucky, alleged that the "Monon" was a corporation of the State of Indiana, and that the defendants, The Contract Company, the Beattyville Company, the Louisville Trust Company, and the natural persons made co-defendants were citizens of States other than Indiana. It charged that the contract with the Contract Company was fraudulent, and was made for the purpose of benefiting some of the directors of the company who became purchasers of some of the guaranteed bonds. A restraining order issued upon this bill, and the defendants having filed a plea to the jurisdiction, said plea and the motion of complainant for a temporary injunction were heard before associate Judge Barr and Circuit Judge Jackson, and the plea overruled and a temporary injunction granted.

Thereupon the Contract Company, being compelled to dispose of its bonds to continue its work, surrendered all the bonds in its possession which had been guaranteed and had the endorsement canceled upon them, and such endorsement has been canceled upon all but $650,000 of the guaranteed bonds. At the time of the decision of the court on the plea to the jurisdiction, none of the *bona fide* holders of the bonds were before the court and no final decree was then entered.

Afterward a supplemental bill was filed setting up what had occurred on the original bill and bringing in most of these purchasers. Some of these new defendants filed demurrers which were heard and overruled by Circuit Judge Lurton and District Judge Barr, the court holding that on demurrer all defendants must be considered as standing in the same relation to complainant as the Contract Company. (See Opinion of court, Tr. 42.)

Answers were then filed denying any allegations of fraud, and alleging the purchase of the bonds in good faith and with-

out notice of any defect. As a matter of fact the fraud is disproved, but at any rate would have no effect upon the controversy with these purchasers.

The real controversy with these purchasers arose out of the grounds asserted in the bill, as follows:

1. That the Company was solely a corporation of the State of Indiana, and that the laws of that State did not authorize the execution of the guaranty; that the law of Indiana provided that such a guaranty could not be made except upon the petition of the holders of a majority of the capital stock of the Company; that there had been no such petition, and that therefore the guaranty by the Board of Directors was *ultra vires* and void, even as to *bona fide* holders for value and without notice.

2. That there was not a quorum of the Board of Directors when the resolution was passed authorizing the guaranty. This contention is disposed of by the stipulation on page 60 of the Transcript, wherein it is stated that the guaranty was authorized by the Board of Directors, but not by the stockholders.

On final hearing before District Judge Barr the guaranty was held void and ordered canceled, and suit thereon against the "Monon" was perpetually enjoined.

From that decree, nineteen defendants appealed, and the cause was heard before Taft, Circuit Judge, and Severens and Hammond, District Judges, and on June 22d, 1896, the opinion of the court was delivered by the Circuit Judge reversing the decree, holding the guaranty valid, and directing the lower court to dismiss appellee's bill. (Tr. 200.)

A petition for rehearing was denied, as was also a motion to file an amended bill. (Tr. 219.)

On November 9th, 1896, appellee petitioned this court to order by *certiorari* the Court of Appeals to certify said cause to this court, which was granted. By stipulation of counsel the two cases now before this court, were certified in lieu of the nineteen appeals heard in the Circuit Court of Appeals, it being agreed that the decision had in those two cases should apply to all the others. (Tr. 221.)

FORM OF GUARANTEE, STATUTES INVOLVED, AGREED FACTS, ETC.

The guarantee endorsed upon the bonds of the Beattyville Company by the "Monon" was in the following words:

> "For value received, the Louisville, New Albany & Chicago Railway Company hereby guarantees to *the holder* of the within bond the payment by the obligor therein of the principal and interest thereof in accordance with the terms thereof.
>
> "In witness whereof, the said Railway Company has caused its corporate name to be signed hereto by its President and its corporate seal to be attached by its Secretary.

The following statutes of Indiana and Kentucky need to be considered in determining the powers, rights, and obligations of the appellee:

Statutes of Indiana in Force March 3, 1865.

Section 3945. *Roads, how sold.* 1. In case of the sale of any railroad and its property, under or by the authority of any competent court or courts (part of which railroad may be situate within the State of Indiana, and part situate in an adjoining State, and embraced in the mortgage or mortgages or deed or deeds of trust), it may be sold at one time and place as an entirety, at such point on the line of said railroad, either within or without the State, and upon such notice as the court or courts ordering such sale may direct.

Sec. 3946. *Incorporation by purchasers.* 2. In case of the sale of any railroad and its property (situated wholly or partly within this State, or situated partly in this State and partly in an adjoining State) by virtue of any mortgage or mortgages or deed or deeds of trust, either by foreclosure or other judicial proceeding, or pursuant to any power contained in such mortgage or mortgages or deed or deeds of trust, or by the joint exercise of said powers and authorities, the purchaser or purchasers thereof, their survivor or survivors, or he or his or they or their associates or assigns, may form a corporation, by filing in the office

of the Secretary of State a certificate specifying the name and style of the corporation, the number of directors, the names of the first directors and the period of their service (not exceeding one year), the amount of original capital, and the number of shares into which said capital is to be divided; and the persons signing said certificate, and their successors, shall be a body corporate and politic by the name in said certificate specified, with power to sue and be sued, contract and be contracted with, and maintain and operate the railroad in said certificate named, and transact all business connected with the same; and a copy of such certificate, attested by the signature of the Secretary of State or his deputy, shall, in all courts and places, be evidence of the due organization and existence of the said corporation and of the matters in said certificate stated.

Sec. 3947. *Franchise pass—Old stockholders released.* 3. Such corporation shall possess all the powers, rights, privileges, immunities, and franchises in respect to said railroad, or the part thereof purchased as aforesaid, and of all the real and personal property appertaining to the same which were possessed or enjoyed by the corporation that owned or held the said railroad, previous to such sale, by virtue of its charter and amendments thereto and other laws of this State, or of any State in which any part of said railroad is situate, not inconsistent with the laws of this State. And it shall have power, at any time after the formation of the corporation as aforesaid, to assume any debts and liabilities of the former corporation, and to make such adjustment and settlement with any stockholder or stockholders or creditor or creditors of such former corporation as may be deemed expedient, and for such purpose to use such portions of the bonds and stock of said corporation as may be deemed advisable and in such manner as said corporation may deem proper; Provided, That all subscribers to the original stock of said railroad company, their heirs, executors, and administrators, shall (by the acceptance or adoption of this act by any purchaser or purchasers of any such railroad, as above provided) be released and discharged from all their unpaid subscriptions which shall not have been previously settled or arranged by agreement or compromise; and provided, further, that all holders of such capital stock which shall have been paid up, and all creditors of any such railroad company, shall have the right to accept and avail themselves of any trusts, agreements, and provisions for recapitalization, for and during the period of six months from and after the passage of this act; and provided, further, that such corporation, when so formed and organized, shall, in suing and being sued, and in operating such railroad, be subject to the gen-

eral laws of this State not inconsistent with the original charter of said road and the amendments thereto.

Sec. 3948. *Power to issue bonds.* 4. Said corporation shall have power to make and issue bonds, bearing such rates of interest not exceeding seven per cent per annum, payable at such times and places, and in such amount or amounts, as it may deem expedient; and to sell and dispose of said bonds at such prices and in such manner as it may deem proper, to secure the payment of any bonds which it may make, issue, or assume to pay by mortgage or mortgages, or deed or deeds of trust of its railroad, or any part thereof, and of its real and personal property and franchises; and to act as a corporation. All property of said corporation included in such mortgage or mortgages or deed or deeds of trust, whether then held or thereafter acquired, shall be subject to the operation and lien of such mortgage or mortgages or deed or deeds of trust; and, in case of sale under same, it shall pass to and become vested in the purchaser or purchasers thereof, so as to enable them to form a corporation in the manner herein prescribed, and to vest in such corporation all the faculties, powers, authorities, immunities and franchises conferred by this act.

Sec. 3949. *Sinking fund—Preferred stock—Bondholders' votes.* 5. Said corporation shall have power to establish a sinking fund for the payment of its liabilities, and to issue capital stock to such aggregate amount as may be deemed necessary, not exceeding the amount named in the certificate of organization; may make preferred stock; make and establish preference in respect to dividends in favor of one or more classes of stock over and above other classes, and secure the same in such order and manner and to such extent as said corporation may deem expedient; and may confer upon the holders of any of the bonds which it may issue or assume to pay the right to vote at all meetings of stockholders (not exceeding one vote for each one hundred dollars of the par amount of said bonds), if deemed expedient; which right to vote, when once fixed, shall attach to and pass with said bonds, under such regulations as said corporation may prescribe, but shall not subject the holder to any assessment made by said company or to any liability for its debts, or entitle any holder thereof to dividends. *The said corporation shall have capacity to hold, enjoy, and exercise, within other States, the aforesaid faculties, powers, rights, franchises, and immunities, and such others as may be conferred upon it by any law of this State or of any other State in which any portion of its railroad may be situate, or in which it may transact any part of its business;* and may hold meetings of stockholders and of its board of directors, and

do all corporate acts and things without this State as validly, and to the same extent as it may do the same within this State, on the line of such road; and may make by-laws, rules, and regulations in relation to its business, and the number of its directors, and the times and places of holding meetings of stockholders and directors, and may alter and change the same as may be deemed expedient.

Sec. 3950. *Foreign corporation—Franchises.* 6. In case a portion of any railroad situated within this State (a part of which is situated in another State) shall become vested in a corporation of another State, the said corporation may exercise and enjoy within this State, and also in such other State for the purposes of such railroad and its business, all the rights, powers, faculties, franchises, and privileges in this act contained; and its mortgages and trust deeds shall operate and be binding as therein specified, and all sales under the same shall be valid and effectual.

Sec. 3951. *Purchase and consolidation of branch roads.* 7. Any railroad company incorporated under the provisions of this act shall have the power and authority to acquire, by purchase or contract, the road, road-bed, real and personal property, rights and franchises of any other railroad corporation or corporations which may cross or intersect the line of such railroad company, or any part of the same, or the use and enjoyment thereof, in whole or in part; may also purchase or contract for the use and enjoyment, in whole or in part, of any railroad or railroads lying within adjoining States; and may assume such of the debts and liabilities of such corporations as may be deemed proper. Upon purchasing any such railroad or railroads all the real and personal property of such corporations so purchased, and also the rights, powers, and franchises of the same, shall become vested in the railroad company so purchasing the same, together with all the rights, powers, privileges, and franchises conferred by the charters of the roads so purchased and all amendments thereto and the provisions of this act; and the company so purchasing and acquiring the title to or use of such railroad or railroads shall have power to complete, maintain, and operate the same. Any railroad company incorporated under the provisions of this act shall also have power to consolidate with other railroad corporations in the continuous line, either within or without this State, upon such terms as may be agreed upon by the corporations owning the same; and also shall have the power and authority to construct, equip, maintain, and operate branch railroads leading from the main line or from the termini of such railroad, from and to such points within this State or any adjoining State as may be deemed expedient; and in constructing the

same shall have the right to enter in and upon all lands; to survey routes; to receive donations of lands or moneys; to purchase and condemn lands required for the use of the road; to lay single or double tracks, and to cross all water-courses and public highways, not unnecessarily obstructing the same. In condemning lands for the use of such roads it shall have all of the rights and powers conferred upon such corporations by their charters and amendments and the general laws of this State. All railroads purchased and branch roads constructed, as aforesaid, shall be vested in and become a part of the property of the corporation so purchasing or constructing the same, as aforesaid; and shall be in all things governed by the laws, rules, and regulations governing the corporation purchasing or constructing the same, as aforesaid, and be operated as part of its line of road. Upon purchasing or constructing any railroad, as hereinbefore provided, the corporation purchasing or constructing the same shall have power and authority to issue new stock to such extent as may be considered advisable, and the same to dispose of as hereinbefore provided; to issue and sell bonds to such extent as may be deemed expedient, and to secure the same by mortgages and deeds of trust upon all the real and personal property, rights, powers, and franchises of any railroad so purchased, constructed, or in course of construction as hereinbefore provided: Provided, That the provisions of this act shall not be so construed as to authorize any railroad company organizing under the same to consolidate with or acquire, by contract or purchase, the road, road-bed, real and personal property, rights, and franchises of any railroad already built, equipped, and operated within the State of Indiana, and which may cross or intersect the line of the road of any company organizing under this act; but the powers of consolidation and purchase shall be and are hereby limited and restricted to such roads within the State of Indiana as may cross and intersect the same, and which have not been equipped and operated in whole or in part.

Statute of Indiana in Force March 8, 1883.

3951*a*. Guaranty of Bonds of Another Company. The Board of Directors of any railway company organized under and pursuant to the laws of the State of Indiana, whose line of railway extends across the State in either direction, may, upon the petition of the holders of a majority of the stock of such railway company, direct the execution by such railway company of an indorsement guaranteeing the payment of the principal and

interest of the bonds of any railway company organized under or pursuant to the laws of any adjoining State, the construction of whose line or lines of railway would be beneficial to the business or traffic of the railway so indorsing or guaranteeing such bonds.

3951*b*. PETITION OF STOCKHOLDERS. 2. The petition of the stockholders specified in the preceding section of this act shall state the facts relied on to show the benefits accruing to the company indorsing or guaranteeing the bonds above mentioned.

3951c. LIMITATION OF THE POWER. 3. No railway company shall, under the provisions of this act, indorse or guarantee the bonds of any such railway company or companies, as is above mentioned, to an amount exceeding one half of the par value of the stock of the railway company so indorsing or guaranteeing as authorized under this act.

The Kentucky statutes are as follows:

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

1. That the Louisville, New Albany & Chicago Railway Company, a corporation organized under the laws of the State of Indiana, is hereby constituted a corporation, with power to sue and be sued, contract and be contracted with, to have and use a common seal, with the power incident to corporations, and authority to operate a railroad.

2. That the Louisville, New Albany & Chicago Railway Company is hereby authorized to purchase or lease for depot purposes, in the city of Louisville or county of Jefferson, such real estate as may be deemed by it to be necessary for passenger and freight depots and transfer, machine shops, and for all switches or turnouts necessary to reach the same; and is also authorized to connect with any railroad or bridge now operated or used, or which may be hereafter operated or used, in said county of Jefferson, and may build any such connecting lines, or lease or operate the same, and for all such purposes shall have the right to condemn all property required for the carrying out of the objects herein named, and may bond the same, and secure the payment of any such bonds by a mortgage of its property, rights, and franchises.

3. That said corporation shall have the power and right to condemn all property in the city of Louisville or county of Jef-

ferson, in this State, which may be deemed by it to be necessary for the purposes set out in this act; and that the proceedings for that purpose shall be instituted either in the Jefferson Court of Common Pleas or the Louisville Chancery Court, and shall be carried on, as nearly as may be, as actions at law by ordinary proceedings. Warning orders against non-residents, absent defendants, or unknown owners of property must be published three times in one of the daily newspapers published in said city of Louisville, State of Kentucky, the last publication at least ten days before the trial. The owners of distinct parcels of one contiguous tract may all be included in one proceeding, or any one or more of them holding contiguous tracts may be proceeded against in a separate action. The courts shall make all such rules, orders, and judgments as will secure a fair trial by an impartial jury of said city or county, and shall give proceedings upon its docket as soon as the parties are before the court and the issue made up. The jurors shall be sworn truly to ascertain and determine by their verdict the amount of compensation each owner will be entitled to if his land or property described in the petition be condemned. The court in which these proceedings are brought shall have power to assign a day for the trial of the case as soon as the petition is filed. Upon the return of the verdict, the court shall render judgment vesting title to the property described in the proceedings in said corporation, said judgment to take effect upon the payment into court by said corporation of the amount of money named in the verdict, within thirty days after the rendition of said judgment; and should said corporation fail to pay said money within said time, the said proceedings shall be dismissed without prejudice to other and subsequent proceedings.

4. This act shall take effect from and after its passage.

Approved April 8, 1880.

This act was afterwards amended, April 7, 1882, by an act entitled "An act to amend an act, entitled 'An act to incorporate the Louisville, New Albany & Chicago Railway Company, approved April 8, 1880:'"

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

1. That the Louisville, New Albany & Chicago Railway Company is hereby authorized and empowered to endorse or guarantee the principal and interest of the bonds of any railway com-

pany now constructed, or to be hereafter constructed, within the limits of the State of Kentucky, and may consolidate its rights, franchises, and privileges with any railway company authorized to construct a railroad from the city of Louisville to any point on the Virginia line, such indorsement, guarantee, or consolidation to be made upon such terms and conditions as may be agreed upon between said companies; or it may lease and operate any railway chartered under the laws of the State of Kentucky: Provided, It shall not lease or consolidate with any two lines of railway parallel to each other; or it may make such traffic arrangement or agreement with any such aforementioned road as its Board of Directors may deem proper.

2. This act shall take effect from and after its passage.

Approved April 7, 1882.

Articles of Association of the Louisville, New Albany & Chicago Railway Company.

"*Know all men by these presents*, That, whereas the New Albany and Salem Railroad Company was organized in the year A. D. 1847, under and in pursuance of a Public Act of the General Assembly of the State of Indiana, approved January 28, 1842; and under the provisions of said act and the amendments thereto, the said railroad company located and constructed a line of railway from the city of New Albany, in the county of Floyd, northwardly through the counties of Clark, Washington, Orange, Lawrence, Monroe, Owen, Putnam, Montgomery, Tippecanoe, White, Pulaski, Starke, and Laporte, to Michigan City, all in the said State of Indiana and being of the length of about 288 miles.

"And whereas, the said corporation, as by law thereto authorized under its corporate seal executed and delivered to one Donn D. Williamson as trustee, two certain trust mortgages, embracing and conveying all and singular the said line of railroad, together with all its property, equipment, and appurtenances, and the franchise to maintain and operate the same and levy and collect tolls therefrom, which said mortgages were severally dated on February 8, 1851, and February 14, 1852, and were given to secure the payment of two issues of bonds which were executed and put into circulation for value by the said railroad company.

"And whereas, on the 24th day of October, 1859, the corporate name of said company was changed, under the authority of the Statutes of the State of Indiana, to the Louisville, New Albany & Chicago Railroad Company.

"And whereas, the said Donn D. Williamson, trustee as aforesaid, departed this life in the year 1869, and the duties, powers, and estate created and vested by the said two mortgages became vested in the alternate trustee named in the said two trust mortgages, viz., Charles E. Bill, of the City and State of New York.

"And whereas, on the 21st day of November, A. D. 1872, the said Charles E. Bill, being such trust mortagee as aforesaid by the consideration of the Circuit Court of the United States within and for the district of Indiana, duly recovered a decree of foreclosure of the said two mortgages hereinbefore mentioned, and an order for the sale of the entire line of said railroad from New Albany to Michigan City as aforesaid, together with its property, equipment, and appurtenances of every description, and also the franchises to operate the same and levy and collect tolls thereon.

"And whereas, on the 27th day of December, A. D. 1872, all and singular the said line of railroad from New Albany to Michigan City inclusive as then located, constructed, and operated, including the right of way and the land occupied thereby, together with the superstructure and tracks thereon, bridges, culverts, fences, depot grounds and buildings thereon, engines, tenders, cars, tools, materials, machinery, furniture, and all other real and personal property appurtenant to the said line of road and used for the purpose of operating the same, together with the franchise to operate the same and levy and collect tolls therefrom under the original charter of said railroad company and the subsequent amendments thereto, was sold at the court-house door in the city of New Albany, Indiana, by John D. Howland, special commisioner, in due accordance with the requirements of said decree of November 21, 1872, and as provided by law, and was then and there purchased by George F. Talman, Frederick Schuchardt, James H. Banker, Moses Taylor, Edward Minturn, Charles P. Leverich, and John Steward, with the design of forming a corporation under the laws of the State of Indiana as is hereinafter stated.

"And whereas, the said John D. Howland, as such special commissioner, did on the said 27th day of December, 1872, execute, acknowledge, and deliver to said purchasers a deed of conveyance of all and singular the property so purchased by them as aforesaid, by virtue whereof the title to all said property and franchises has become vested in fee-simple absolute in the said purchasers who are subscribers hereunto.

"Now therefore, for the purpose of carrying out the design of the said purchase and forming a corporation of the State of

Indiana which shall of right possess and enjoy all the powers, rights, privileges, immunities, and franchises in respect to the said line of railroad so conveyed to and vested in the undersigned, which were at any time possessed and enjoyed by the said New Albany and Salem (lately the Louisville, New Albany & Chicago) Railroad Company, under its original charter and the amendments thereto, the said purchasers, under the authority and in connection with the provisions of the statutes of the State of Indiana in relation to the purchase of railroads, and especially under requirements of an act of the General Assembly of the State of Indiana, entitled 'An act to authorize, regulate, and confirm the sale of railroads, to enable purchasers of the same to form corporations and to exercise corporate powers, and to define their rights, powers and privileges; to enable such corporations to purchase and construct connecting and branch roads and to operate and maintain the same,' approved March 3, 1865, and a certain act supplemental thereto which was approved December 20, 1865, do by these Articles of Association, by them subscribed, form and constitute themselves into a corporation which shall be called

"THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,

"and the said corporation, by the name aforesaid, on the filing of these articles in the office of the Secretary of State, shall, by virtue thereof, have, possess, and enjoy the said line of railroad from New Albany to Michigan City, and all its appurtenances and equipments as specifically set out in the conveyance to the undersigned as the exclusive property of the said corporation hereby created, and the said corporation shall also have, exercise and enjoy all and singular the powers, rights, privileges, immunities, and franchises in respect to said line of railroad as completely in every respect as the same were held, exercised, and enjoyed by the said Louisville, New Albany & Chicago Railroad (formerly the New Albany & Salem Railroad) Company, under its original charter and the amendments thereto, and as the same were vested in the undersigned by the conveyance aforesaid.

"The number of directors shall be thirteen (13), and the following persons are constituted the first Board of Directors, to continue in office until the 1st day of January, 1874: George F. Talman, Moses Taylor, Frederick Schuchardt, James H. Banker. Edward Minturn, Charles P. Leverich, John Steward, James F. Joy, George S. Schuyler, John Jocob Astor, Roswell G. Rolston, Jonathan T. Wells, and Isaac Bell.

"The capital stock of the said corporation shall be and is hereby fixed at the sum of three millions of dollars, divided into thirty thousand shares of one hundred dollars each.

"In witness whereof the said incorporators have hereto set their hands and seals this 31st day of December, 1872.

"GEORGE F. TALMAN.	[Seal]
"FREDERICK SCHUCHARDT.	[Seal]
"CHARLES P. LEVERICH.	[Seal]
"JOHN STEWARD.	[Seal]
"MOSES TAYLOR.	[Seal]
"EDWARD MINTURN.	[Seal]
"JAMES H. BANKER.	[Seal]

"STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.

"Before me, a Notary Public in and for said county and city, personally appeared the above-named incorporators, George F. Talman, Frederick Schuchardt, James H. Banker, Moses Taylor, Edward Minturn, Charles P. Leverich, and John Steward, and acknowledged the execution of the above articles of association as their act and deed for the purposes therein specified.

"Witness my hand and official seal this 2d day of January, 1873.

[Seal] W. D. SEARLS, Notary.

"Box 406. Pa. 7.

"Articles of Association of the Louisville, New Albany & Chicago Railway Company. Received January 7, 1873. Office Secretary of State. Filed January 1, 1873.

"JOHN H. FARQUHAR."

The following facts were admitted and stipulated into the record by the parties thereto:

"It is agreed between the parties hereto that the contract between the Louisville, New Albany & Chicago Railway Company and the Ohio Valley Improvement & Contract Company filed with a bill of complaint herein and the endorsement of the bonds by the former of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, were executed upon the sole authority of the Board of Directors of the Louisville, New Albany & Chicago Railway Company, and that no petition of any of the stockholders of the said company requesting said endorsement in the manner

pointed out by Section 3951*a*, *b*, *c* of the Statutes of Indiana or in any other manner was ever signed or executed and no authority was conferred by said stockholders upon such directors, and such directors had only such authority as existed by virtue of their existence as such directors.

"It is further agreed that the guaranteed bonds referred to, numbered from 1 to 600 inclusive, were endorsed with such guarantee by the officers of the Louisville, New Albany & Chicago Railway Company on the — day of December, 1889; that 585 of such bonds, numbered from 601 to 1185 inclusive, were so endorsed and delivered on the 11th of March, 1890; that the regular meeting of the stockholders of the Louisville, New Albany & Chicago Railroad Company convened on the next day, March 12th, 1890, and no meeting had been held after the above contract of guarantee had been entered into until such regular meeting was held on the 12th day of March, 1890, and on which day, a majority of the board of directors were changed and such meeting then adjourned to the 22d day of March, 1890; that at such adjourned meeting the board of directors reported to the stockholders that the beforementioned bonds had been guaranteed and a resolution was adopted by a majority of all the outstanding stockholders objecting thereto and disclaiming any liability by reason of such guarantee."

ARGUMENT.

The real questions in this case are

I. Whether the "Monon" had any power to make the guarantee.

II. Whether that power was so exercised as to bind the "Monon" on its guaranty as to holders with knowledge of the facts, and

III. Whether the guaranty is binding as to *bona fide* holders for value and without notice.

The first point to be considered then is the source from which the "Monon" derives its power. This depends upon whether it is a corporation of the State of Indiana solely or also a corporation of Kentucky. The Court of Appeals held it to be a corporation of Kentucky as well as of Indiana, and that that holding is correct, we shall now attempt to show.

Appellee is a Kentucky Corporation.

An examination of the act of 1880 shows, we think, a plain intention on the part of the State of Kentucky to create a Kentucky corporation. The title of the act declares it to be "an act to incorporate the Louisville, New Albany & Chicago Railway Company;" the body of the act gives it power to sue and be sued, contract and be contracted with, to have and use a common seal, with the power incident to corporations. It gives the right to operate a railroad; the authority to purchase and lease real estate; the authority to connect with other roads or bridges then operated or to be operated in Kentucky; to build and operate connecting lines; authority to condemn land, with a special power and method of procedure; designates the courts in which it may proceed, and gives precedence in the trial of its condemnation cases.

These are very broad and unusual powers, and as well said by the Court of Appeals, "It may be too much to say that these are powers never conferred by the legislature of one State upon the corporation of another, but it is certainly true that they are powers more naturally and generally conferred by a State upon a body of its creation."

It is urged, however, by counsel for appellees that inasmuch as no provision is made for stock, stockholders, directors or corporate officers, the Kentucky act must be construed as a mere enabling act. This contention is met and well answered, we think, by the opinion of the Court of Appeals, in which Judge Taft says:

> "It is true that there is no provision in the incorporating act for stock, and there are many provisions frequently made in the organization of new companies, by incorporating individual incorporators, which are here omitted; and if it is not in the power of a State to incorporate the corporation of another State by adoption, so to speak, then this act might very well be construed only to affect a license to the Indiana corporation to do the business and exercise the powers in the act named, in the State of Kentucky, so far as they may be consistent with its powers and limitations of power in its Indiana charter. Under such a construction the first section of the act, in so far as it attempts to create a Kentucky corporation, would have to be regarded as merely nugatory. But it is not true that one State may not incorporate a corporation of another State as such. It may be done, too, without any specific provisions for the stock or internal government of the new corporation. This is expressly settled by several decisions of the Supreme Court of the United States." Citing
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> Railroad v. Harris, 12 Wall. 65;
> Railroad v. Vance, 96 U. S. 450;
> Clark v. Bernard, 108 U. S. 436;
> Graham v. Hartford R. R., 118 U. S. 161.

A short review of those cases may not be amiss:

Railroad Company v. Harris was an action for personal injuries brought by Harris in the District of Columbia against

the Baltimore & Ohio Railroad Company. The court reviewed the legislation in regard to the company, and held that the acts of Virginia and the District of Columbia did not create a corporation, but that they were mere enabling acts, and that the Baltimore & Ohio Railroad Company was only a corporation of the State of Maryland, where it was originally chartered. The court, however, said:

> "That there was no reason why several States can not by competent legislation unite in creating the same corporation or in combining several pre-existing corporations into a single one." . . . "Nor do we see any reason why one State may not make a corporation of another State, as there organized and conducted, a corporation of its own *quo ad hoc* any property within its territorial jurisdiction. The question is always one of legislative intent and not of legislative power or legal possibility."

In Railroad Company v. Vance, 96 U. S. 450, it appeared that an Indiana corporation had leased the property and franchises of an Illinois corporation, that the lessee had by an act of the State of Illinois been confirmed in its lease and created a corporation of the State of Illinois. The court denied that this act was a mere license to the Indiana corporation to exercise its corporate powers and enjoy its corporate rights and privileges in another State, but said the Illinois act created the Indiana corporation an Illinois corporation. The Court said:

> "We can not thus restrict the effect of the act, without disregarding wholly the ordinary meaning of the plain words of its second section, which declares that the lessees, their associates, successors, and assigns, *shall be a railroad corporation in the State of Illinois.* It does more: It gives the style by which that corporation shall be known. Still further, it does not authorize the complainant corporation to exercise in Illinois, the corporate powers conferred by the laws of Indiana; but upon the corporation, which it declares shall be a railroad corporation in Illinois, it confers, by affirmative language, 'the same or as large powers as are possessed' by an Illinois corporation, the St. Louis, Alton & Terre Haute Railroad Company and, in addition, such

other powers as are usual to railroad corporations. The Indianapolis & St. Louis Railroad Company, as lessee of the St. Louis, Alton & Terre Haute Railroad Company, was thus created, by apt words, a corporation in Illinois. The fact that the corporation thus brought into existence and declared to be a corporation of Illinois by a law of that State bears the same name as that given to the Indiana corporation, can not change the fact that they are distinct corporations, deriving their existence from the separate and independent legislation of those States. . . But it may be suggested that the utmost which can be claimed for the act, is, that, without creating a new corporation in Illinois, it only made the complainant, as an Indiana corporation, a corporation of the State of Illinois. It was clearly competent for the General Assembly to have done this, as held in R. R. Co. v. Harris, 12 Wal. 82, where the court said: 'Nor do we see any reason why one State may not make a corporation of another State, as there organized and conducted, a corporation of its own, *quo ad* any property within its territorial jurisdiction.'"

In the Kentucky Act, as in the Illinois Act, we find an express declaration that the Indiana corporation is made a corporation of its own State; we find also "that the style by which that corporation shall be known," is given, and "still further," the Kentucky Act "does not authorize the complainant corporation to exercise" in Kentucky "the coporate powers conferred by the laws of Indiana," but "by affirmative language" declares what the powers of the Kentucky corporation shall be. Judged by every rule laid down in Railroad Company v. Vance, the Kentucky Act is found to create a Kentucky corporation.

In the case of Clark v. Barnard, 108 U. S. 437, the Harris and Vance cases were approved and followed. It appeared that the Boston, Hartford & Erie Railroad Company was a corporation of the States of Massachusetts and Connecticut. It purchased the franchises and railroad of the Hartford, Providence & Fishkill Railroad Company, which was a consolidated corporation deriving its existence and powers from the States of Connecticut and Rhode Island. By an Act of the

Legislature of Rhode Island, this sale of the Hartford, Providence & Fishkill Railroad Company was confirmed, and the Boston, Hartford & Erie Railroad was by that name, given the right to enjoy the rights, privileges, and powers theretofore granted and belonging to the Hartford, Providence & Fishkill Railroad Company. Afterwards the Legislature of Rhode Island passed an Act amendatory to this one, by which was given to the Boston, Hartford & Erie Railroad Company the right to extend its line within the State of Rhode Island, upon condition that it would within a specified time execute a bond to that State in the penalty of $100,000 to make the extension. The bond was given, but the company failed to extend the line, became bankrupt, and the State of Rhode Island claimed the money. It was urged that the agreement was *ultra vires;* that the directors of the Massachusetts and Connecticut corporation had no right to apply for or receive grants from the legislature of Rhode Island. The court said:

> "It is now argued by counsel for the appellees that the party which, in all these transactions, was dealing with the State of Rhode Island was the Boston, Hartford & Erie Railroad Company, in its character as a corporation of the State of Connecticut; that, as such, it had no power, under the charter granted by that State, to build or own a railroad directly connecting Boston and Providence, nor had it, as such, any capacity to receive a grant of such a franchise; that, consequently, every thing done or attempted in that behalf was *ultra vires* and void.
>
> "But the Boston, Hartford & Erie Railroad Company was also a corporation of Rhode Island. As such it owned and operated a railroad within that State, and had received and exercised franchises under its laws, to which it was in all respects subject. It was the assignee of the road and rights connected therewith, formerly belonging to the Hartford, Providence & Fishkill Railroad Company; and it was this corporation, dwelling and acting in Rhode Island, that the legislature by the act in question, authorized to exercise the additional powers it conferred.
>
> "If it had had no previous existence as a corporation under the laws of Rhode Island, it would have become such by virtue of the act in question. For although as a Con-

necticut corporation it may have had no capacity to act or exist in Rhode Island for these purposes, and no capacity by virtue of its Connecticut charter to accept and exercise any franchises not contemplated by it, yet the natural persons, who were corporators, might as well be a corporation in Rhode Island as in Connecticut, and by accepting charters from both States could well become a corporate body, by the same name and acting through the same organization, officers, and agencies in each, with such faculties in the two jurisdictions as they might severally confer. The same association of natural persons would thus be constituted into two distinct corporate entities in the two States, acting in each according to the powers locally bestowed, as distinctly as though they had nothing in common either as to name, capital, or membership. Such was in fact the case in regard to this company, so that in Rhode Island it was exclusively a corporation of that State, subject to its laws and competent to do within its territory whatever its legislation might authorize.

"Nor do we see any reason (as was said by this Court, Mr. Justice Swayne delivering its opinion, in Railway Company v. Harris, 12 Wall. 65–82) why one State may not make a corporation of another State, as there organized and conducted, a corporation of its own, *quo ad* any property within its territorial jurisdiction. That this may be done was distinctly held in the Ohio & Mississippi Railroad Company v. Wheeler, 1 Black, 297. The same view was taken in Railway Company v. Whitton, 13 Wall. 270, in Railroad Company v. Vance, 96 U. S. 450, and in Memphis & Charleston Railroad Company v. Alabama, 107 U. S. 581. *The question of the powers of the Boston, Hartford & Erie Railroad Company, as a corporation in Rhode Island, and the legal effect of its acts and transactions performed in that State, is to be determined exclusively by the laws of that State, and not by those of Connecticut, which have no force beyond its own territory. It results, therefore, that the doctrine of ultra vires, as here urged by the appellees, has no place in this controversy.*"

In Graham v. Boston, Hartford & Erie Railway Company, 118 U. S. 161, the Supreme Court considered an act of New York quite similar in effect to that of Rhode Island considered in the case of Clark v. Barnard. The New York Legislature there authorized the Boston, Hartford & Erie to purchase the

franchises and property of two other corporations and to exercise the rights, privileges, and franchises of such corporations. The Supreme Court said:

> "As a purchaser of what this act authorized to be sold to it, the company purchasing became a New York corporation by its then existing name."

It then cities with approval the cases of Clark v. Barnard and Railroad Company v. Harris.

The following cases recognize the same doctrine:

Pennsylvania Company v. St. Louis Company, 118 U. S. 296.
Martin v. B. & O. Railway Company, 151 U. S. 677.
Markwood v. Southern Railway Company, 65 Fed. Rep. 823.
The Western & Atlantic R. R. Co. v. Roberson, 22 U. S. App. 187 (61 Fed. R. 593).

Counsel for appellees insist, however, that the case of Railway Company v. James, 161 U. S. 545, either relieves these cases of the interpretation and force given them by the Court of Appeals, or directly overrules them, and by an ingenious patchwork of different parts of the Court's opinion, seek to sustain their contention. Thus on page 27 of their brief, they say

> "The Circuit Court of Appeals held that this court decided (R'y Co. v. James) that the
> "'Missouri company might be a corporation of Arkansas by virtue of the statute making it such,' etc.
> "It is clear that that Court either overlooked or misinterpreted the following clear and unambiguous language of this court (p. 564):
> "'It is therefore obvious that such purchase by the Missouri corporation of the railroad and franchises of the Arkansas companies did not convert it into an Arkansas corporation'; that 'it would be necessary to create it out of natural persons whose citizenship of the State creating it could be imputed to the corporation itself.'"

Counsel have here knowingly taken a part of the opinion dealing with the Arkansas Act of 1881, and separated it by the word "that" of their own coinage, from a part of the opinion

relating to the Arkansas Act of 1889 and made it to appear that this Court decided that a corporation could only be created by incorporating natural persons. If we have read aright the decision in R'y Co. v. James, this Court did not decide that only by incorporating natural persons, can a corporation be created, but that as *regards the question of citizenship*, a corporation is deemed to be a citizen of the State first creating it, and that this presumption is conclusive, and where such a corporation is subsequently incorporated as such by another State, it does not thereby become a citizen of the second State, but though a corporation of the second State, and as such subject to its laws, its citizeuship remains that of the State first creating it.

Again, on page 30 of their brief, counsel say that the doctrine is

> "Finally and fully announced in Railway v. James, that a State can not create a corporation out of a corporate incorporator of another State; that a State can only incorporate the natural persons who may be the incorporators of a foreign corporation, and thereby create a distinct corporation by its own legislation. Judge Shiras, in delivering the opinion of the court (Railway v. James) and in defining the requisite material for incorporators, said: 'In order to bring such an artificial body as a corporation within the spirit and letter of that constitution, as construed by the decisions of this court, it would be necessary to create it out of natural persons, whose citizenship of the State creating it could be imputed to the corporation itself.'"

If counsel had seen fit to observe the language that immediately precedes and that which follows the above extract, they had seen that the court refers to the provision of the Federal constitution relating to the jurisdiction of Federal Courts as dependant on citizenship, and that the court decided not what counsel so confidently assert but only that as regards jurisdiction the corporate incorporator of the second State, retains its original citizenship though it has become a *corporation* of the second State. That we may correct the false impression sought to be given by these skillfully selected extracts, we give the following language of the court.

On page 562, the Court said:

> "We are now asked to extend the doctrine of indisputable citizenship, so that if a corporation of one State indisputably taken for the purpose of Federal jurisdiction, to be composed of citizens of such State, is authorized by the law of another State to do business therein, and to be endowed, for local purposes, with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the second State, in such a sense as to confer jurisdiction on the Federal courts at the suit of a citizen of the State of the original creation.
>
> "We are unwilling to sanction such an extension of a doctrine which, as heretofore established, went to the very verge of judicial power. That doctrine began, as we have seen, in the assumption that State corporations were composed of citizens of the State which created them; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the Federal courts might be defeated. Then, after a long contest in this court, it was settled that the presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary. There we are content to leave it."

The Court, after setting out the provisions of Section 5 of the Arkansas Act of 1881, then says:

> "It was under the provisions of this section that the St. Louis & San Francisco Railroad Company in 1882 purchased from corporations of Arkansas the railroad already built by them, extending from the southern boundary of Missouri to Ft. Smith in Arkansas. These Arkansas corporations have since maintained their separate organizations as corporations of that State, but do not operate railroads. It is therefore obvious that such purchase by the Missouri corporation of the railroad and franchises of the Arkansas companies did not convert it into an Arkansas corporation. The terms of the statute show that it merely granted rights and powers to an existing foreign corporation, which was to continue to exist as such, subject only to certain conditions—among others, that of keeping an office in the State, so as to be subject to process of the Alabama courts.
>
> "It is true that by the subsequent Act of 1889, by the proviso to the 2d section, it was provided that every railroad corporation of any other State, which had theretofore

leased or purchased any railroad in Arkansas, should within sixty days from the passage of the act, file a certified copy of its articles of incorporation or charter with the Secretary of State, and shall thereupon become a corporation of Arkansas, any thing in its articles of incorporation or charter to the contrary notwithstanding: and it appears that the defendant company did accordingly file a copy of its articles of incorporation with the Secretary of the State. But whatever may be the effect of such legislation, in the way of subjecting foreign railroad companies to control and regulation by the local laws of Arkansas, we can not concede that it availed to create an Arkansas corporation out of a foreign corporation *in such a sense as to make it a* CITIZEN *of Arkansas within the meaning of the Federal Constitution so as to subject it as such to a suit by a citizen of the State of its origin.* In order to bring such an artificial body as a corporation within the spirit and letter of that constitution, as construed by the decisions of this Court, it would be necessary to create it out of natural persons, whose citizenship of the State creating it could be imputed to the corporation itself. But it is not pretended in the present case that natural persons, resident in and citizens of Arkansas, were by the legislation in question created a corporation, and that therefore the citizenship of the individual corporators is imputable to the corporation."

It is contended, however, by counsel for appellees (Brief p. 34), "that without legislative authority and consent of Indiana, the Indiana "New Albany" could not enter into a charter contract with the State of Kentucky, and could exercise no powers in Kentucky which it could not exercise at home."

Our answer is twofold: First, that full power is given the Indiana corporation by Sec. 3949 Rev. Statutes of Indiana to accept the Kentucky charter, and that second: Having acquired Kentucky property, rights and privileges from the State of Kentucky, it will, as far as its Kentucky property is concerned, be held bound by the Kentucky Act irrespective of the Indiana law.

Sections 3945 to 3951 inclusive of the Revised Statutes of Indiana relate to and govern corporations created and organized as the "Monon" was. A reading of those sections and the original Articles of Incorporation of the "Monon" shows this so plainly as to need no further comment.

Now Section 3949 of those statutes provides, among other things, that

> "The said corporation shall have capacity to hold, enjoy, and exercise, within other States, the aforesaid faculties, powers, rights, franchises, and immunities, *and such others as may be conferred upon it by any law of this State* OR OF *any other State in which any portion of its railroad may be situate, or in which it may transact any part of its business.*"

Counsel quote this part of the section on pages 34 and 35 of their brief, and, we trust by inadvertence, have replaced the words "or of" which we have printed in heavy type, by the word "in," which changes the entire meaning of the paragraph, and gives some color to the argument there presented.

The statute so conclusively shows the power to accept the Kentucky Act to exist that we do not feel warranted in further discussing the point.

As to the binding effect of the Kentucky Act irrespective of the statute law of Indiana, as regards property situated in Kentucky, we desire only to refer the court to the case of Clark v. Barnard, 108 U. S. 436, and to page 21 of this brief, where we have discussed the case and quoted from the opinion rendered.

It will be seen that the same contention was made there as here, and the court's answer there applies with equal force to the case at bar.

The Consolidation of the Indiana "New Albany" with an Illinois Corporation in 1881, even if Valid, did not Destroy the Kentucky Corporation.

Two years after the passage of the Kentucky Act creating appellee a Kentucky corporation, the Legislature of Kentucky passed an act amending it, by which full power was expressly given appellee to make the guaranty in question. The Louisville, New Albany & Chicago Railway Company had, however, a year prior to this second Kentucky Act attempted a consolida-

tion with a corporation of Illinois, the consolidated company retaining the old name of the Indiana constituent. We shall not discuss the very serious question of the validity of that consolidation, leaving it to associate counsel, but desire to refer this Court to the case of American Loan & Trust Co. v. Railway Co., 157 Ill. 641, where the Supreme Court of that State held the consolidation to be void. Assuming the consolidation to be valid, let us examine the contention of counsel for appellee. It is urged that even if the Kentucky Act of 1880 created the "New Albany" a Kentucky corporation, yet by virtue of this consolidation, the Kentucky corporation, not being mentioned as a party to the articles of consolidation, ceased to exist, and there was no such corporation for the Kentucky Legislature in 1882 to grant additional powers to. Just how this Kentucky corporation dissolved itself into thin air is not explained by counsel. It is manifest that it could only cease to exist by virtue of its own act and an acquiescence of the State of Kentucky in its dissolution. Neither of these things ever occurred. It was never for a moment contemplated by the "New Albany" company when it consolidated with the Illinois company that its Kentucky charter should be destroyed. Article 3 of the Contract of Consolidation provides that

> "The said consolidated corporation hereby created shall be vested with all the rights, privileges, immunities, and franchises which usually pertain to railroad corporations under the laws of the respective States of Illinois and Indiana, wherein the lines of its railroad are situate, *and shall also be vested with all and singular the rights, powers, privileges, immunities, capacities, and franchises which before the execution of these articles was lawfully possessed or exercised by either of the parties hereto.*"

By Article 9 it was provided that the principal place of business and general office of the consolidated corporation should be established in *the city of Louisville, Kentucky.*

It is apparent that one of the franchises possessed by the Indiana corporation was a franchise of existing as a Kentucky

corporation, and by the terms of consolidation that franchise passed into and became a part of the consolidated corporation. The Court of Appeals puts the case in this strong way:

> "We do not perceive that this consolidation creates any difficulty. The Kentucky corporation having been once established could not die except by its own act or that of the State which gave it being. Every thing it had acquired in the way of property remained in it after the consolidation of its constituent with the Illinois corporation. It was not and could not be ousted of its franchise thereby. The Kentucky corporation when incorporated, was intended by the Legislature of Kentucky to be under the same organization and the management as the Indiana Company. When the incorporators of the Indiana Company added others to their number by virtue of the laws of Indiana, and to this extent changed the management, the franchises which the incorporators had obtained by the incorporation of the old company in Kentucky were simply transferred by express provision of the articles of consolidation to the new organization. If it were necessary to have such a transfer approved by the Kentucky Legislature, we have it recognized and approved in the act of April 7, 1882, in recognizing and adding to the powers of the Kentucky corporation which was then being managed by the consolidated corporation of Indiana and Illinois."

The Kentucky Acts were Accepted by the Consolidated New Albany Company.

That the Consolidated New Albany Company never doubted that the Kentucky charter still existed and that it possessed all the powers and privileges thereby created is shown by innumerable of its acts, among others the following:

1. It executed on March 24, 1884, a deed of trust to the Farmers Loan & Trust Company as a corporation created and existing under the laws of the State of Indiana and *Kentucky*.

2. It executed a deed of trust, of date January 1, 1886, to the same Trust Company as a corporation of the State of Indiana and *Kentucky*.

3. It instituted condemnation proceedings in the County Court of Jefferson County, Kentucky, on February 25, 1887, under and by virtue of the power granted it by the *State of Kentucky*.

4. In the case of Lizzie Woods v. The L. N. A. & C. R. R. Co. the New Albany Company removed the case from the State Court of Indiana to the Federal Court for the District of Indiana upon the ground that it was a *Kentucky* corporation.

5. It executed a lease with The Louisville Southern Railroad on December 7, 1888, wherein it describes itself as a corporation of the States of Indiana and *Kentucky*.

(As to all these acts, see Stipulation, Tr. 65–7.)

Having shown, as we believe, that the "Monon" is a Kentucky corporation, it is plain that the Kentucky Act of 1882 gave it the right and power to make the guaranty on the Beattyville bonds. It remains then to ascertain whether that power was so exercised as to bind the "Monon" as a Kentucky corporation.

The Directors of the "Monon" Under the Power Granted by the Kentucky Act of 1882 Had the Right to Make the Guaranty.

We believe it to be well-settled law that where the management of a corporation is vested in a board of directors, as in the case of railroad companies, such board, in the absence of express limitation, possess all the powers of the corporation. Thus it has been held that the Board of Directors may issue negotiable paper, execute mortgages, make contracts, leases, and perform all acts which do not involve an organic change in the corporation. We shall not attempt a general discussion of the authorities, as the law is plain, but content ourselves by referring the Court to the following text-writers and decisions where the rule is plainly set out:

Thompson on Corporations, §§ 3970, 3985;
2 Cook on Stockholders, §§ 708, 709, 712, 808;
1 Morawetz on Private Corporations, § 516;
1 Wood Railway Law, § 151;
Hoyt v. Thompson's Executor, 19 N. Y. 216;
L. E. & St. L. R'y v. McVey, 98 Ind. 393;
Thompson v. Natchez W. & S. Co., 68 Miss. 423;
Hodden v. K. & G. R. R. Co., 7 Fed. Rep. 796;
Wood v. Welen, 93 Ill. 153;
Hendee v. Pinkerton, 96 Mass. 387;
Beveridge v. N. Y. E. R. R. Co., 112 N. Y. 1;
Flagg v. Manhattan Railroad, 10 Fed. Rep. 431;
Nashua R. R. Co. v. Boston R. R. Co., 27 Fed. Rep. 825;
Same case on appeal, 136 U. S. 384;
McCulloch v. Moss, 5 Denio, 575;
Moses v. Tompkins, 84 Alabama, 613;
Dana v. Bank of United States, 5 W. & S. 223;
Hudson v. Green, 91 Missouri, 367;
Gashwiler v. Willis, 33 Cal. 11;
Conro v. Fort Henry Iron Co., 12 Barbour, 27.

The rule giving directors the powers of the corporation is, however, subject to an exception where the power claimed, if exercised, would work an organic or fundamental change in the company. (Railway Company v. Allerton, 18 Wall. 233.) That the power conveyed in the Act of 1882 is not within this exception, is, we think, plain. The power to guarantee the bonds of another road is a very important one, but so also is the power to lease another road, to mortgage its own road which creates a debt of a higher dignity than a guaranty, and yet these last powers have uniformly been held, in the absence of express provision, to be lodged in the board of directors. In the Kentucky Act we find the directors are given the authority expressly to make such traffic arrangement or agreement with the road whose bonds they are authorized to guarantee. Is it reasonable to suppose that the directors are given the primal and important power of making the agreement which shall be the consideration for the guaranty, and are not given the power to make the mere guaranty itself?

It is said that by virtue of the Indiana law of 1881 (Section 3951*a*, *b*, *c*,) the action of the stockholders is made necessary to a valid guaranty.

We answer that Kentucky gave the power without that restriction, a year prior to the enactment of the Indiana law, and the latter State can not restrict the power of the Kentucky corporation. (Clark v. Barnard, *supra*.)

Trusting that we have established the liability of the "Monon" as a Kentucky corporation on its guaranty, we shall now discuss the question of its liability as an Indiana corporation.

APPELLEE AS AN INDIANA CORPORATION HAD THE POWER TO MAKE THE GUARANTY, AND AS TO BONA FIDE HOLDERS WITHOUT NOTICE, IS LIABLE FOR SUCH GUARANTEED BONDS.

We shall not discuss the right and power of appellee to make the guaranty by virtue of any statute of Indiana other than the statute of 1883, Section 3951*a*, *b*, *c*, as those branches of the case are fully covered by the brief of associate counsel. Indeed we feel an inability to present any argument as to the liability of appellee under that section which can add to the exceedingly able opinion of Judge Taft. We shall endeavor, therefore, to avoid a repetition of what is there stated, and to simply supplement it by a brief argument, considering first

The Power of Appellee's Board of Directors under Section 3951*a*, *b*, *c*, to Make the Guaranty.

The language of the statute on this point is conclusive. It is as follows:

> "That the *Board of Directors* of any railroad company organized under and pursuant to the laws of the State of Indiana whose line of railway crosses the State in either direction, *may*, upon the petition of the holders of a majority of the stock of such railroad company, *direct* the execution by such railroad company of an *indorsement guaranteeing* the principal and interest of the bonds of any railway company organized under or pursuant to the laws of any adjoining State," etc.

Here the power is directly conferred on said Board of Directors, and on no one else, to cause said guaranty to be endorsed on the Beattyville bonds. It is true that said power is conferred,

coupled with a condition, but nevertheless the *power*, we shall seek to show, is conferred, and the power and the condition upon the fulfillment of which it is to be exercised are separate and distinct things. The power may or may not be rightfully exercised, while the condition remains wholly unfulfilled. While the condition may be fully complied with, that is, in this case, the requisite number of appellee's stockholders might present the required petition to the Directors, and still the Board of Directors could not rightfully execute any guaranty unless the *power* was delegated to them so to do.

It is insisted by counsel for appellee that the *power* in this case was so connected with the condition upon which it could be exercised that the one could not be legally exercised without the previous compliance with the condition, or rather, that there was no delegation of power that did not embrace the fulfillment of said condition. If this was so, then the action of the board of directors without the performance of the precedent condition, would be absolutely void, and being so, no subsequent ratification or acquiescence could give it validity. This court has, however, held to the contrary in the case of Zabriskie v. The Cleveland, etc., Railroad Company, 23 How. 381.

That the power can be wholly separated from the condition, so that the former may be exercised while the latter is wholly uncomplied with, is well illustrated by the case of the Royal British Bank v. Turquand, 6 Ellis & Blackburn's, 327—a case on the the authority of which, this Court rested the case of the Commissioners of Knox County v. Aspinwall, 21 How. 539–546.

The Court will recollect that the action in that case was upon a bond against the defendant as the manager of a joint stock company. The defense was want of power under the deed of settlement or charter to give the bond, one of the clauses in the charter providing that the Directors might borrow money on the bonds in such sums as should from time to time, by a general resolution of the company, be authorized to be borrowed. The resolution that was passed was considered defective.

The Court, Jarvis, Ch. B., said:

> "We may take it for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are bound to do no more. And the party here, in reading the deed of settlement, would find not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which, in the face of the document appeared to be legitimately done."

Here it is conceded that the resolution, on the passage of which depended the rightful exercise of the power to borrow money, was not passed, and yet the power was exercised and the court said it was exercised so as to bind the company. Here the power is separated from the condition, which was not fulfilled. The power was known to exist, but the fulfillment of the condition was supplied by the presumption that it had been fulfilled, arising from the borrowing of the money.

We next call attention of the court to said case of the Commissioners of Knox County v. Aspinwall, based on said English case of the Royal British Bank v. Turquand, which case was decided in 1859, and has never been overruled, nor has the British case been ~~deemed~~ denied as applied to a private corporation.

After determining that the commissioners had conclusively *decided*, by their recital on the bonds, that the ~~preceding~~ act condition had been complied with so as to bind the corporation and protect the *bona fide* holders of the bonds, the court proceeds to say and decide as follows:

> "Another answer to this ground of defense is that the purchaser of the bonds had a right to assume that the vote of the county, which was made a condition to the grant of power, had been obtained from the fact of the subscription by the board to the stock of the railroad company and the issue of the bonds."

In this case it is conceded, as a matter of fact, by the Court that the prescribed preliminary condition had not been complied

with, and yet the court held that the power was rightfully exercised notwithstanding, as to the *bona fide* holder of the bond, the purchaser having a right to assume that the vote of the county had been taken.

The County of Pendleton v. Henry Amy, 13 Wall. 297, was a suit by the purchaser of some bonds issued by the county of Pendleton in payment of its subscription to the capital stock of the Covington and Lexington Railroad. The defense was *want of power* in the county to issue the bonds; that although the legislature authorized the county to subscribe to said capital stock and issue bonds in payment of same, yet the authority was coupled with a proviso that the real estate holders residing in the county should so vote by a majority at such times as the County Court might appoint. No such vote was taken. The court said:

> "Without legislative authority, a municipal corporation, like a county, may not subscribe to the capital stock of a railroad company and bind itself to pay its subscription or issue its bonds in payment, and, if it does, the purchaser of such bonds is affected by the want of authority to make them.
>
> "But," say the court, "it does not follow from this that when the legislature *has given its sanction* to the issue of bonds, provided that before their issue certain things shall be done by the officers or the people of the county, the bonds can be avoided in the hands of an innocent purchaser by proof that the county officers or the people have not done, or have insufficiently done the things which the legislature required to be done before the authority to subscribe or to issue bonds should be exercised. A purchaser is not always bound to look further than to discover that the *power* has been conferred, although coupled with conditions precedent.
>
> "When, therefore, they make a subscription and issue county bonds in payment, it may fairly be presumed, in favor of an innocent purchaser of the bonds, that the condition which the law attached to the exercise of the power has been fulfilled."

That is to say, the purchaser of the bonds must know before he purchases that the *power exists* for their issue, but that being

so, he will under certain conditions be protected, though the precedent conditions have not been complied with. We are well aware that in the municipal bond cases this court has held that there must be a recital on the bonds in order to protect the innocent holder for value where the condition has not been complied with, but the fact that there can be an estoppel in any event, of necessity determines that *power* exists in the absence of the fulfillment of a precedent condition.

If we have sustained our contention that *power* existed in the Board of Directors of appellee to make the guaranty even though the precedent condition of a stockholders' vote was not complied with, it remains but to examine whether the power was so exercised as to bind appellee in favor of *bona fide* holders without notice.

We readily admit that, not considering appellee's power to make the guarantee as derived from other statutes, any person with knowledge of the absence of action on the part of the stockholders can not hold the appellee on its guaranty.

We insist, however, that the guaranteed bonds in the hands of *bona fide* holders for value without notice are valid obligations of appellee. It is doubtless unnecessary to cite authority in support of the proposition that the Beattyville bonds are commercial paper. We, however, refer the court to

Burroughs on Public Securities, page 229;
Daviess County v. Hindekoper, 8 Otto, 98;
Moran v. Miami County, 2 Black. 722.

Likewise the guaranty endorsed on the bonds is negotiable.

Killian v. Ashby *et al.* 24 Ark. 511;
Cooper & Peabody v. Diedrick, 26 Wend. 430;
Bartridge v. Davis, 20 Vt. 497;
Webster v. Cobb, 17 Ills. 166;
Jackson v. Foote, 12 Fed. Rep. 37;
Studebaker v. Cady, 54 Ind. 586;
Davis v. Wells, Fargo & Co., 104 U. S. 690;
Toppan v. C. C. & C. R. R. Co., 1 Flippin, 74.

The weight of the above cited authorities is materially supplemented by the form and purpose of said guaranty:

1. It is in form negotiable, made payable to the "*holder*" thereof, which is the same as though payable to bearer.

2. The guaranty is endorsed on negotiable bonds having thirty years to run to maturity.

3. Said bonds and the guaranty endorsed thereon were intended to be sold in the open market to raise money thereby with which to build and equip the Beattyville road. Now, with what intent were said guarantees made, and with what intent received, except that thereby (for that has much to do with the character of the instrument) an obligation of payment should be created on the part of the guarantor that should accompany said bonds into the hands of any and all successive lawful holders thereof until the bonds and each coupon attached thereto should be paid, partaking all the time of the negotiable character of the bonds on which it was endorsed?

The bonds and guarantee thereon being negotiable and giving to the holder all the rights that pertain to commercial paper, we insist that

The Power in the Board of Directors to Make the Guarantee, was so Exercised as to Bind the Appellee in Favor of Bona Fide Holders of Said Guarantees.

In the case of Battles & Webster v. Lendenschlager, 84 Penn. St., the court tersely states the law thus: "The latest decisions, both in England and in this country, have set strongly in favor of the principle that *nothing* but *clear evidence* or knowledge or notice, fraud or *mala fides* can impeach *prima facie* title of a holder of negotiable paper taken before maturity."

In the case of Storey v. American Life Insurance Co., 11 Paige Ch. R. 635, the court said:

"The negotiable security of a corporation which, upon its face, appeared to have been duly issued by such corporation and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof without notice, although such security was in fact issued for a purpose, and at a place not authorized by the charter of the company and in violation of the laws of the State where it was actually issued."

We call attention to an extract from the opinion in the case of the Farmers National Bank v. The Sutton Manufacturing Co., 52 Fed. Rep. 191, which is as follows:

"If the extrinsic fact upon which depends the lawful character of the act is one peculiarly within the knowledge of the general agent of the corporation by whom the act is done, the act itself is an implied representation that the necessary facts exist, the truth of which the corporation is estopped to deny against any person who in dealing with the corporation has parted with value on the faith of it. *The principle has been frequently applied in cases of commercial paper issued in the name of the corporation by its officers having general authority to issue such paper.*"

The following cases illustrate the same rule:

Farmers & Mechanics Bank v. Butchers & Drovers Bank, 16 N. Y. 125.
Bissell v. Railroad Cos., 22 N. Y. 289.
Wright v. Line Co., 101 Pa. St. 204.
Water Co. v. DeKay, 36 N. J. Eq. 548.
Credit Co. v. Howe Mach. Co., 54 Conn. 357.
Gelpcke v. City of Dubuque, 1 Wall. 203.
Genessee Co. Sav. Bank v. Mich. Barge Co., 52 Mich. 438.
Bird v. Dagget, 97 Mass. 494.
Bank v. Young, 7 Atl. Rep. 488.
Mich. Bank Ass. v. N. Y. & S. White Lead Co., 35 N. Y. 505.

We have cited all the authorities that it seems to us necessary in support of the proposition that the bonds and guaranty being negotiable, *bona fide* holders of such have a right to rely for their protection on the fact of the existence of the *power* to make said guarantees, and are not affected with the failure of the performance of the precedent condition.

The Guaranty Valid as the Act of Appellee's Agent.

The court will indulge us now for a short time, in our attempt to show, by abundant authorities, that the liability of appellee to our clients on the guarantee endorsed on their bonds is also fixed by the application to the facts of the case of the principles of the law of agency.

When we speak of the principles of the law of agency controlling this case we mean those principles as applied to private corporations, and not those principles as applied to municipal corporations. The distinction is marked between the liability of a private corporation for the acts of its agents and the liability of the municipal corporation for the acts of its officers. Overlooking or disregarding this difference, counsel for appellee ascertaining, as they thought they had, that in the courts of the United States it had been held, as to municipal bonds, that the *bona fide* purchaser of such bonds did not acquire a good title by his purchase, unless he first ascertained that the previous condition to the exercise of the *power* to issue the bonds had been complied with; or that said bond was subject to the municipal decision, contended that the same doctrine should be applied to the exercise of the *power* of private corporations to issue bonds; and, hence, inasmuch as the directors in this case, before the preliminary condition had been fulfilled, issued the bond, said bonds, as they concluded, must be null and void.

Had they considered the difference in the relation between the agents of a private corporation and their principal, and the officers of a municipal corporation and the corporation, they could not have fallen into such gross errors.

We know that a private corporation is invested with certain power to be exercised for a certain purpose, having reference to profits to its stockholders, that these powers must be exercised and these purposes accomplished by and through agents, and these agents are human beings subject to infirmity and liable to

err, innocently and ignorantly, or with evil design, and still their acts, done within the *apparent* scope of their authority, will bind the principal.

These private corporations have no records that the public have a right to inspect, and no certain way of ascertaining whether a precedent condition to the exercise of a power has been fulfilled.

Any damage arising from the unauthorized acts of the directors of private corporations falls alone on the corporation, whose agents they are, and not on the public, whose agents they are not.

The agents are not officers of the law, whose powers and duties are defined by statute, nor ~~or~~ are the records of their proceedings public records required by law to be kept. While a municipal corporation is a government agency, its agents all public officers, whose powers and duties are fixed and defined by public law, accessible to all, and they can do only what the law expressly empowers them to do, and that law being accessible to all, all who deal with these officers or agents can know, and should be held bound to know, whether they are discharging their duties as prescribed and defined by law, and the purchaser of a municipal bond will be protected in his purchase of such bond only when, as a matter of fact, the precedent condition has been complied with, or when the corporation has estopped itself from saying that the condition has not been fulfilled by the recital on the bonds that it has.

The acts of these officers, agents, are made matters of public record, to which records all persons have access, and hence, as to the purchaser of a municipal bond, on which there is no recital indorsed, there can be no excuse for not examining these records, and his bonds will be held invalid if, on such examination, he does not find the condition complied with.

This difference between public and private corporations is thus spoken of and considered by the authorities:

In 72 Ill. 604, Chief Justice Walker said:

"It has been uniformly held by this court that inasmuch as municipal corporations are created for governmental purposes and not for business purposes, when such a body is empowered to enter into trade or enterprises of a private character there are no *presumptions* in such acts; but in their performance *it must appear* that the law has been strictly complied with before the performance of such act will be enforced by the law."

Such rule does not apply to this case.

In private corporations the question is not whether, as to the liability of the principal, all the requirements of the law have been complied with by the agent, but whether the principal had power to perform the acts that have been done by the agents within the line of their employment.

In the case of Humbolt Township v. Long, 2 Otto, 642, Mr. Justice Miller, commenting on the case of the Royal British Bank v. Turquand, says:

"The bank in that case was not a corporation, it was a joint stock company in the nature of a partnership. The action was against the manager as such, and the question concerned his power to borrow money.

"This power depended, in this particular case, on a resolution of the company—the charter or deed of settlement gave the power, and when it was exercised the court held that the lender was not bound to examine the records of the company to see if the resolution had been legally sufficient.

"This was a private partnership. Its papers and records *were not* open to public inspection—the manager and directors were not officers of the law, whose powers were defined by statute, nor was the existence of the condition on which the power depended *to be ascertained* by the inspection of public and official record made and kept by officers of the law for that very purpose. In all these material circumstances that case differed widely from the case before us."

In Eastern Railway Counties v. Hawks, 4 H. L. Cas. 331, 373, it is said:

"There is a broad difference between private corporations and public, municipal corporations in reference to the doctrine of *ultra vires*, or want of power. In the case of

> private corporations, or corporations not municipal, the tendency of the court is to restrain the doctrine of *ultra vires* to clear cases of excess of power *with* the *knowledge of the other party*, express or implied, from the nature of the corporation and of the contract entered into." (*Do.* 366.)

In its application to municipal corporations, the rule is much more rigid. (*Do.* 367.) In Monumental National Bank v. Globe Works, 101 Mass. 57, Hoar, Justice, held:

> "That the officers of such corporations (municipal) can not, like the officers of a private corporation, by their own act, create an estoppel against its tax-payers and people so as to render illegal issues of ordinary city drafts or vouchers, not authorized by law, valid in the hands of holders for value—such holders are affected with the notice of the illegality."

Many more authorities might be cited on this point, but it is deemed unnecessary to cite more. Enough has been cited, we trust, to show that the difference between the powers and duties of the officers of a municipal corporation and the relation of said officers to the corporation are so different from the powers and duties of the agents of a private corporation, and their relation to such corporation, that the principles which control the acts of said officers would not, in many cases, and in this case, control or be applicable to the acts of said agents.

Hence, we say that the authorities relied on by appellee do not apply to the acts of the directors in making the guarantees in this case. But we are governed by, and confidently rely on, the decisions that pertain to private corporations alone—where there is *discretion* and *presumption* in the agents.

We insist that the directors in this case were not agents in the ordinary sense of the word, but were practically the corporation itself, yet technically they were not the corporation, and are in a sense agents, hence we treat them as agents of the corporation.

Now what is the law of private corporations to be applied to this case? To what extent do the wrongful acts of an agent of a private corporation bind the corporation in fraud of a *bona fide* holder, for value, before maturity?

In Green's Brice's *Ultra Vires*, p. 344, it is said "Corporations can be made liable for the frauds of their agent only when acting within their authority, express or implied."

The author then asks the question, "What frauds are within an agent's authority to commit?" For answer to it he refers to the opinion of the Privy Counsel in the case of Mackay v. Commercial Bank of New Brunswick, L. R. 5 P. C. 394–411, in which it is said:

> "It is seldom possible to prove that the fraudulent act complained of was committed by the express authority of the principal, or that he gave his agent general authority to commit wrongs or fraud.
>
> "Indeed, it may be generally assumed that in mercantile transactions principals do not authorize their agents to act wrongfully, and consequently that frauds are beyond the scope of the agent's authority in the *narrowest sense* of which the expression admits."
>
> "But," say the counsel, "so narrow a sense would have the effect of enabling principals largely to avail themselves of the frauds of their agents without suffering losses or incurring liabilities on account of them, and would be opposed as much to justice as authority.
>
> "A wider construction has been put on the words:
>
> "Principals have been held liable for frauds when it has not been found that they authorized the particular fraud complained of, or gave generally authority to commit fraud. At the same time it is not easy to define with precision the extent to which this *liability has been carried.*
>
> "The best definition of it, in their Lordships' judgment, is to be found in the case of Barnick v. English Joint Stock Bank. With respect to the question whether a principal is answerable for the act of his ~~against~~ agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule that the master is answerable for *every wrong* of the servant or *agent* as is committed *in the course of the services* and for the master's benefit, *though no express command* or privity of the master is proved. The principle is acted upon every day in running-down cases (that is, cases arising from damages to persons by street vehicles). It has been applied also to direct trespass to goods."

After enumerating other instances of its application the court proceeds:

> "In all these cases it may be said, as it was said here, that the master had not authorized the act. It is true he has not authorized the particular act, but he has put the *agent in his place* to do that class of acts, and he must be answering for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in."

This case seems to fully cover our case. While it is doubtless true that appellee did not authorize the Board of Directors to execute the bonds, no petition from the stockholders having been presented to them, and it is also probably true that appellee had no knowledge that such an act had been so done, unless the knowledge of the directors was the knowledge of appellee, yet appellee knew that the directors of that corporation were expressly authorized by the legislature and empowered to execute said bonds, and in executing them it was within the scope of its duty as agent; and, possessing said knowledge, appellee, and not our clients, chose the directors, and thereby, as its agents, placed them in the position where they could violate their duty and wrongfully issue the bonds.

Appellee creating the opportunity of said directors to wrongfully execute the power possessed, appellee should be bound by that act.

Burroughs, p. 247, citing many authorities, speaks thus on this subject:

> "The weight of authority as to completed, negotiable instruments of private parties, which, by fraud or inadvertence, have passed into the hands of holders for value without notice of the manner in which they were put into circulation, is that the makers are bound, although they do not intend that the note should be put into circulation. The want of delivery is not a defect apparent on the face of the paper. The maker has given to it all the appearance of *validity*, and if one of two innocent parties is to suffer, he who has put it *into the power* of a third party to produce this condition of things ought to suffer, and not the innocent holder."

See Krogan v. Wohlferd, 17 Minn. 239; Clark v. Johnson, 54 Ia. 296; Bussen v. Huntington, 21 Mich. 415.

Here the principal has put it in the power of a third party to place in the hands of a *bona fide* holder his own note, which he did not intend should go into circulation, and for that act of want of care he must suffer the consequences rather than the innocent holder.

In the case at bar our clients are, as to most of the bonds, *bona fide* holders, without notice, of any defect of guarantees indorsed on the bonds, and appellee put it in the power of the directors, by making them directors, to execute said guarantees, and hence, as principal, appellee is responsible for its agent's said acts.

In the case at bar it was contended, by counsel for appellee, that because the directors wrongfully executed the power, as to appellee, in making the guaranty, therefore, in so doing, they were not the agents of appellee. This is not the law.

In the case of McDonald v. Lane, 18 Ga. 444, it was held that " where the *charter* of a bank required that 25 per cent in specie of the capital stock subscribed should be paid before the Board of Directors should proceed to issue notes," and this was never done, but the board issued the notes, they were held binding on the bank in favor of an innocent holder.

See Mayor Norwich v. Norfolk R. R. Co., 4 El. and Bl. 397.

Here the power of the bank to issue notes depended on the compliance, first of the condition that 25 per cent of the capital stock should be paid. The required amount of specie had not been paid, still the Board of Directors issued notes and they were held binding on the bank in favor of an innocent holder.

This seems much like the case at bar.

Says Justice Story in his work on Agency, Secs. 452–562 and 563:

> " It is a general doctrine of law, that although the principal is not ordinarily (for he sometimes is) liable in a criminal suit for the acts or misdeeds of his agent, unless, indeed, he has authorized or co-operated in these acts or misdeeds;

yet he is held liable to third persons in a civil suit for frauds, deceits, concealments, misrepresentations, torts, negligence, and other malfeasances. or misfeasances and omissions of duty of his agent, in the course of his employment, although the principal did not authorize or justify or participate in or indeed know of such misconduct or even if he forbade the acts or disapproved of them.

"In all such cases the rule applies *respondeat superior*, and it is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal or indirectly with him through the iustrumentality of agents.

"In every such case he holds out his agents as competent and fit to be trusted, and thereby in effect he warrants his fidelity and good conduct in all matters within the scope of the agency."

In this case the Board of Directors were made, in substance, the corporation, but really as agents of the corporation by the act of the legislature, and the making of said guarantees was as much in the line of their duties and scope of their employment as any other act they were authorized to perform as directors, hence, for such act, appellee is responsible.

In support of the doctrine above laid down by Mr. Justice Story, he cites numerous authorities.

The same doctrine is laid down in the case of Fitsherbert v. Mather, 1 L. R. 11, and Lock v. Stearn and others, 1 Mass. 563:

"The rule is laid down generally in a recent compilation of good authority (3 Chitty Law of Com. and Manufactures, 209, 210), that though a principal in general is not liable criminally for the acts of his agent, yet he is civilly liable for the neglect, fraud, deceit, and other wrongful acts of his agent in the *course of his employment*, though in fact the principal did not authorize the practice of such acts."

In 2 Herman on Estoppel, p. 1333, it is stated:

"The company is bound by all the acts of its agents within the scope of his *apparent authority* unless notice is given the assured that, with reference to matters within the scope of his *apparent* authority, certain limitations are im-

> posed upon the agent. The question is not what the *powers* of the agent in fact are, but what were his *apparent powers*. That is, what had the assured a right to believe were given to the agent (Do. 1332), and such company is estopped by the statement of a party, whom it holds out to the public as its agent, within the scope of their authority, however much he may have exceeded it in practice."

In the case at bar *power* existed in the directors to make the guaranty—they made it—*they appeared*, by the manner and form of making the guaranty, to be acting with full authority, and, being agent of appellee, appellee is responsible.

In the case at bar we find from the evidence, uncontradicted, that agents of the Contract Company, men of unimpeachable veracity and honesty, and in good faith, publicly sold the Beattyville bonds to raise money thereby to build and equip the Beattyville Railroad. That our clients bought these bonds without any knowledge other than that which they had learned from the Beattyville and the Louisville New Albany & Chicago Railroads, and from the guaranty endorsed on them in the name and under the seal of appellee, signed by its president, and attested just as should have been done if said guaranty had been properly endorsed as to appellee. Judging from the appearance of said guarantees, and all the known circumstances of the making of said bonds, had not our clients the right to believe that said directors had at least apparent authority to make said guaranty?

In Gelpcke v. Dubuque, 1 Wall. 175, it is said:

> "It is a general doctrine that when a corporation has authority, by itself or by its agent, to issue *negotible securities* the *bona fide* holder thereof has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper."

The same doctrine in nearly the same words is announced in the case of Hackett v. Ottawa, 9 Otto, 608.

The reason for the existence of such doctrine is, and it is in

harmony with other doctrines of the law, that when a corporation has *power* to issue negotiable securities, by such issue it makes itself liable for the payment of such securities, and the *bona fide* holder of them, knowing of the *power* to issue, is protected against any defense founded on any equities existing between prior parties, or of the want of compliance with any precedent condition, especially when the fullfilment of such condition is to be done by the corporation or some of its officers, and can be performed by no one else.

We call the attention of the court to the case of The New York & New Haven R. R. Co. v Schuyler, 34 N. Y. 31. This was an action in the nature of a suit in equity against Robert Schuyler and several hundred other defendants.

The object of the complaint was to have a large number of alleged false and fraudulent certificates and transfers of pretended stock of the company, made by Schuyler as agent, and charged to be held by the defendants, adjudged spurious and void (p. 31), and compel the certificates to be brought into court and cancelled, and to enjoin the several defendants from further prosecuting actions then pending, and from bringing suit against the company to enforce such certificates and transfers, or to give damages for any reasons connected therewith.

The court will perceive that in principle this case and the one at bar are almost precisely alike, and that the same law will properly apply to both.

The court held that the unauthorized acts of Schuyler, as the agent of the company, were binding on the company in favor of the *bona fide* holders of the alleged fraudulent certificates.

During the discussion of the various questions arising in the case the court laid down, among others, the following legal proposition:

> "It is impossible to escape the conclusion that the law of this State, as settled by adjudication at this day is, as put by H. R. Seldon, J., in Griswold v. Haven, as follows: 'That when the authority of an agent *depends upon some fact*

> *outside the terms of his power*, and which, from its nature, rests particularly within his knowledge, the principal is bound by the representations of the agent,' " although false as to the existence of such fact. "Seldon therein also stated that the mode in which the liability is enforced in all these cases is by estoppel *in pais;* the agent or partner has, in each case, made a representation as to a fact essential to his power upon the faith of which the other party has acted, and the principal or firm is precluded from controverting the facts as represented."

Where is the substantial difference between the facts of that case and those of the case at bar? In each case the agent exceeded his authority, but, being an agent, his principal in that case was held responsible for his unauthorized act.

In the case at bar the appellee alone had power to execute the guaranty, and it, and not our clients, knew whether the precedent condition had been complied with; and hence, our clients may rely on the *presumption* that it has been complied with.

The *execution and delivery of the guaranty* by the Board of Directors, they at the same time knowing, and our clients not knowing, and not having the means of ascertaining, whether the petition of the stockholders had been presented to said Board of Directors, before the guaranty was made, and our clients, being *bona fide* holders, without notice, of the invalidity of the guarantees, was a representation that the condition had been complied with, and, as against our clients, could not now be contradicted.

In the opinion just cited, the court further said:

> "We may come back, therefore, to the solid ground of The North River Bank v. Aymen, regarding it only as shaken down to greater firmness by the severe ordeal of the Farmers & Mechanics Bank case, and, with confidence, declare the true doctrine of this branch of the law of evidence to be that when the *principal has clothed his agent with the power to do act upon the existence of some extraneous fact necessarily and peculiarly within the knowledge of the agent, and the existence of which the act executing the power is itself a representation*, a third person dealing with such agent in

entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying the truth to his prejudice."

In The North River Bank v. Aymen, 3 Hill, 262, the above doctrine is stated in these words:

"Whenever the very act of the agent is authorized by the terms of the power, that is, whenever, by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent as to all persons dealing in good faith with the agent, such persons are not bound to inquire into facts *aliunde*, the *apparent authority* being the real authority."

From the case of Story v. American Life Ins. Co., 11 Paige, Ch. R. 635, we copy from Chancellor Walworth's opinion the following extracts:

"The negotiable security of a corporation which, upon its face, appeared to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof, without notice, although such security was in fact issued for a purpose, and at a place not authorized by the charter of the company, and in violation of the laws of the State where it was actually issued"—and further the Chancellor says: 'The general principle, we think, fairly deducible from the authorities, is this, the general agent of a corporation clothed with a certain power by the charter, or the lawful act of the corporation, may use that power for an unauthorized, or even prohibited purpose, in his dealings with an innocent third party and yet render the corporation liable for his acts."

Relying on the previously cited authorities to sustain the claims of our clients, we conclude this portion of our brief by a summary statement of the result of said authorities and the facts to which they have been applied:

1. The Board of Directors, and they alone, are expressly *empowered* by the Legislature of Indiana to execute the guarantees in controversy.

2. The guarantees, as indorsed on the bonds, and the bonds on which they were indorsed, are each negotiable instruments.

3. Being negotiable, our clients, as *bona fide* holders of said bonds and guaranty, are entitled to the protection afforded to *bona fide* holders of negotiable bills of exchange or other negotiable paper, which protection extends to every defense not based on *want of power* alone in said directors to issue said guaranty.

4. The directors, in the execution of said guaranty, were the agents of appellee; and, having the power—intrusted by the legislature—and being by them elected as directors and placed in a position where they could abuse their trust, and being the chosen representatives of appellee, held out as worthy of all confidence in their employment, for their wrongful act appellee, as their principal, should be responsible.

Respectfully submitted,

SWAGAR SHERLEY,

Of Counsel.

ST. JOHN BOYLE,
BARNETT, MILLER & BARNETT,
SWAGAR SHERLEY,
Counsel.

POINTS AND AUTHORITIES.

I.

Appellee is a Kentucky Corporation.

Act of April 1, 1880, General Assembly of Kentucky.

Railroad v. Harris, 12 Wall. 65.

Railroad v. Vance, 96 U. S. 450.

Clark v. Barnard, 108 U. S. 436.

Graham v. Hartford R. R., 118 U. S. 161.

Pennsylvania Company v. St. Louis Company, 118 U. S. 296.

Martin v. B. & O. Railway Company, 151 U. S. 677.

Markwood v. Southern Railway Company, 65 Fed. Rep. 823.

The Western & Atlantic R. R. Co. v. Roberson, 61 Fed. Rep. 593.

Railway Company v. James, 161 U. S. 545.

II.

The consolidation of the Indiana "New Albany" with an Illinois Corporation in 1881, even if valid, did not destroy the Kentucky Corporation.

American Loan & Trust Co. v. Railway Co., 157 Ill. 641.

Articles 3 and 9 of the Contract of Consolidation.

Act of April 7, 1882 (Ky. Acts 1881-82, Vol. 2, 251).

III.

The Kentucky Acts were accepted by the Consolidated New Albany Company.

(*a*). Its deed of trust of date March 24, 1884.

(*b*). Its deed of trust of date January 1, 1886.

(*c*). Condemnation proceedings in the Jefferson County Court, February 25, 1887.

(*d*). Removal of suit of Woods v. L. N. A. & C. R. R. Co. from State Court of Indiana to Federal Court on its allegation that it was a Kentucky Corporation.

(*e*). Lease with the Louisville Southern Railroad of date December 7, 1888.

As to all these acts, see stipulation, Tr. 65-67.

IV.

The directors of the "Monon," under the power granted by the Kentucky Act of 1882, had the right to make the guaranty.

Thompson on Corporations, Sections 3970, 3985.
2 Cook on Stockholders, Sections 708, 709, 712, 808.
1 Morawetz on Private Corporations, Section 516.
1 Wood Railway Law, Section 151.
Hoyt v. Thompson's Executor, 19 N. Y. 216.
L. E. & St. L. R'y v. McVey, 98 Ind. 393.
Thompson v. Natchez W. & S. Co., 68 Miss. 423.
Hodden v. K. & G. R. R. Co., 7 Fed. Rep. 796.
Wood v. Welen, 93 Ill. 1531.
Hendee v. Pinkerton, 96 Mass. 387.
Beveridge v. N. Y. E. R. R. Co., 112 N. Y. 1.
Flagg v. Manhattan Railroad, 10 Fed. Rep. 431.
Nashua R. R. Co. v. Boston R. R. Co., 27 Fed. Rep. 825.
Same case on appeal, 136 U. S. 384.
McCulloch v. Moss, 5 Denio, 575.
Moses v. Tompkins, 84 Alabama, 613.
Dana v. Bank of United States, 5 W. & S. 223.
Hudson v. Green, 91 Missouri, 367.
Gashwiler v. Willis, 33 Cal. 11.
Conro v. Fort Henry Iron Co., 12 Barbour, 27.
Clark v. Barnard, 108 U. S. 436.

V.

Power existed in the Board of Directors of the "Monon" under Section 3951*a*, *b*, *c*, of the Revised Statutes of Indiana, to make the guaranty.

Zabriskie v. The Cleveland, etc., Railroad Co., 23 How. 381.
Royal British Bank v. Turquand, 6 Ellis & Blackburn, 327.
Commissioners of Knox Co. v. Aspinwall, 21 How. 539.
County of Pendleton v. Amy, 13 Wall. 297.

VI.

The Beattyville bonds are commercial paper.

Burroughs on Public Securities, page 229.
Daviess County v. Huidekoper, 8 Otto, 98.
Moran v. Miami County, 2 Black, 722.

VII.

The guaranty endorsed on the Beattyville bonds is negotiable.

Form of the guaranty, made payable to holder.
Killian v. Ashby *et al*, 24 Ark. 511.
Cooper & Peabody v. Diedrick, 26 Wend. 430.
Bartridge v. Davis, 20 Vt. 497.
Webster v. Cobb, 17 Ill. 166.
Jackson v. Foote, 12 Fed. Rep. 37.
Studebaker v. Cady, 54 Ind. 586.
Davis v. Wells, Fargo & Co., 104 U. S. 690.
Toppan v. C. C. & C. R. R. Co., 1 Flippin, 74.

VIII.

The power in the Board of Directors to make the guarantee was so exercised as to bind appellee in favor of *bona fide* holders.

Battles & Webster v. Lindenschlager, 84 Penn. St.
Storey v. Am. Life Ins. Co., 11 Paige Ch. R. 635.

Farmers National Bank v. Sutton Mfg. Co., 52 Fed. Rep. 191.

Farmers & Mechanics Bank v. Butchers & Drovers Bank, 16 N. Y. 125.

Bissell v. Railroad Co., 22 N. Y. 289.

Mech. Bank Asso. v. N. Y. & S. White Lead Co., 35 N.Y. 505.

Wright v. Line Co., 101 Pa. St. 204.

Water Co. v. DeKay, 36 N. J. Eq. 548.

Credit Co. v. Howe Machine Co., 54 Conn. 357.

Gelpcke v. City of Dubuque, 1 Wall. 203.

Genessee Co. Sav. Bank v. Mich. Barge Co., 52 Mich. 438.

Bird v. Daggett, 97 Mass. 494.

Bank v. Young, 7 Atl. Rep. 488.

IX.

The guaranty is valid as the act of Appellee's Agent.

Humbolt Township v. Long, 2 Otto, 642; 72 Ill. 604.

Eastern Railway Counties v. Hawks, 4 H. L. Cases, 831.

Burroughs on Public Securities, page 247.

Green Brice's Ultra Vires, page 344.

Krogan v. Wohlferd, 17 Minn. 239.

Clark v. Johnson, 54 Ia. 296.

Bussen v. Huntington, 21 Mich. 415.

McDonald v. Lane, 18 Ga. 444.

Mayor Norwich v. Norfolk R. R. Co., 4 Ellis & Black. 397.

Story on Agency, §§ 452, 562.

Fitsherbert v. Mather, 1 L. R. 11.

Lock v. Stearn, 1 Mass. 563.

2 Hermann on Estoppel, p. 1333.

Gelpcke v. Dubuque, 1 Wal. 175.

Hackett v. Ottawa, 9 Otto, 608.

N. Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y. 31.

North River Bank v. Aymen, 3 Hill, 262.

FILED

IN THE SUPREME COURT OF THE UNITED STATES.

[redacted]

Appellant,

vs.

[redacted]

Appellees.

[redacted]

Appellant,

vs.

[redacted]

Appellees.

[redacted]

BRIEF IN BEHALF OF THE APPELLEE FIRST ABOVE.

[redacted]

ST. JOHN BOYLE,

[redacted]

Supreme Court of the United States.

THE LOUISVILLE TRUST COMPANY, - *Appellant*,

VERSUS

THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, ETC., *Appellees*.

Brief in behalf of The Louisville Trust Company.

This suit in equity was originally brought by the Louisville, New Albany & Chicago Railway Company—called the New Albany Company—against the Ohio Valley Improvement and Contract Company *et al.*, to cancel a guaranty which the New Albany Company had endorsed upon certain bonds of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, otherwise called the Beattyville Company. A decree was entered in the Circuit Court directing a cancellation of the guaranty, and from this decree an appeal was prosecuted to the Circuit Court of Appeals for the Sixth Circuit.

The Circuit Court of Appeals reversed the decree of the Circuit Court, and a writ of *certiorari* was awarded by the Supreme Court, and pursuant to which the Record has been certified to this Court.

The New Albany Railway Company was originally an Indiana corporation, and operated a railroad between Chicago and the city of New Albany, Indiana, and had been formed and incorporated under the general laws of the State of Indiana. Desiring to extend its line of railway into the State of Kentucky and to acquire terminal properties in the city of Louisville, it procured the passage of an act by the Legislature of Kentucky, on April 8, 1880, entitled "An act to Incorporate the Louisville, New Albany & Chicago Railway Company." This act is as follows:

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

1. That the Louisville, New Albany & Chicago Railway Company, a corporation organized under the laws of the State of Indiana, is hereby constituted a corporation, with power to sue and be sued, contract and be contracted with, to have and use a common seal, with the power incident to corporations, and authority to operate a railroad.

2. That the Louisville, New Albany & Chicago Railway Company is hereby authorized to purchase or lease for depot purposes, in the city of Louisville or county of Jefferson, such real estate as may be deemed by it to be necessary for passenger and freight depots and transfer, machine shops, and for all switches or turnouts necessary to reach the same; and is also authorized to connect with any railroad or bridge now operated or used, or which may be hereafter operated or used, in said county of Jefferson, and may build any such connecting lines, or lease or operate the same, and for all such purposes shall have the right to condemn all property required for the carrying out of the objects herein named, and may bond the same, and secure the payment of any such bonds by a mortgage of its property, rights, and franchises.

3. That said corporation shall have the power and right to condemn all property in the city of Louisville or county of Jefferson, in this State, which may be deemed by it to be necessary for the purposes set out in this act; and that the proceedings for that purpose shall be instituted either in the Jefferson Court of Common Pleas or the Louisville Chancery Court, and shall be carried on, as nearly as may be, as actions at law by ordinary proceedings. Warning orders against non-residents, absent defendants, or unknown owners of property must be published three times in one of the daily newspapers published in said city of Louisville, State of Kentucky, the last publication at least ten days before the trial. The owners of distinct parcels of one contiguous tract may all be included in one proceeding, or any one or more of them holding contiguous tracts may be proceeded against in a separate action. The courts shall make all such rules, orders, and judgments as will secure a fair trial by an impartial jury of said city or county, and shall give proceedings upon its docket as soon as the parties are before the court and the issue made up. The jurors shall be sworn truly to ascertain and determine by their verdict the amount of compensation each owner will be entitled to if his land or property described in the petition be condemned. The court in which these pro-

ceedings are brought shall have power to assign a day for the trial of the case as soon as the petition is filed. Upon the return of the verdict, the court shall render judgment vesting title to the property described in the proceedings in said corporation, said judgment to take effect upon the payment into court by said corporation of the amount of money named in the verdict, within thirty days after the rendition of said judgment; and should said corporation fail to pay said money within said time, the said proceedings shall be dismissed without prejudice to other and subsequent proceedings.

4. This act shall take effect from and after its passage.

Approved April 8, 1880.

This act was afterwards amended, April 7, 1882, by an act entitled "An act to amend an act, entitled 'An act to incorporate the Louisville, New Albany & Chicago Railway Company,' approved April 8, 1880:"

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

1. That the Louisville, New Albany & Chicago Railway Company is hereby authorized and empowered to endorse or guarantee the principal and interest of the bonds of any railway company now constructed, or to be hereafter constructed, within the limits of the State of Kentucky, and may consolidate its rights, franchises, and privileges with any railway company authorized to construct a railroad from the city of Louisville to any point on the Virginia line, such indorsement, guarantee, or consolidation to be made upon such terms and conditions as may be agreed upon between said companies; or it may lease and operate any railway chartered under the laws of the State of Kentucky: Provided, It shall not lease or consolidate with any two lines of railway parallel to each other; or it may make such traffic arrangement of agreement with any such aforementioned road as its Board of Directors may deem proper.

2. This act shall take effect from and after its passage.

Approved April 7, 1882.

In 1889 this Railroad Company, which is known as "The New Albany Company," leased the railroad of the Louisville Southern Railroad Company, which railroad extended from Louisville to Lexington, in Kentucky, connecting with the Cincinnati Southern Railroad.

At that time there was being constructed a railroad from Versailles, on the Louisville Southern, to Beattyville, in Kentucky, at which point there were valuable coal fields. This Company had procured large subscriptions from the counties along its projected route, and had made a contract with the Ohio Valley Improvement and Contract Company, by which the Contract Company had agreed to construct and equip the line of railroad. In consideration thereof the Railroad Company was to execute and issue to the Contract Company its first mortgage bonds at $25,000 per mile, to transfer to the Contract Company the subscriptions it had received from the communities, and also to issue to the Contract Company all of its capital stock except that which would have to be issued on account of such subscriptions.

Under these circumstances the New Albany Company, desiring to obtain access to the coal fields of Eastern Kentucky, made an agreement with the Contract Company, which was then engaged in the work of construction, by which it undertook to guarantee the payment of the Beattyville Company's bonds *in consideration of receiving three fourths of the entire capital stock of the Beattyville Company.* (Rec. p. 20.)

The work of construction proceeded, and as the bonds were delivered to the Contract Company *pari passu* with the work done, the New Albany Company endorsed its guaranty upon such bonds and received the proportion of the capital stock to which it was entitled under its contract, until they had endorsed the bonds to the amount of $1,185,000 and received $888,750 of the capital stock of the Beattyville Company.

Shortly afterwards the management of the New Albany Company was changed at a meeting of the stockholders; and shortly thereafter the new management repudiated the agreement to guarantee the bonds, and on April 9, 1890, brought its bill of complaint in this cause for the purpose of canceling the contract with the Contract Company, and its endorsement which had already been placed upon the bonds.

The bill of complaint charges that the contract with the Contract Company was fraudulent, and was made for the purpose of benefiting some of the directors of the company who became purchasers of some of the guaranteed bonds.

A restraining order issued upon this bill, and the defendants having filed a plea to the jurisdiction on the 28th day of May, 1890, the plea was overruled and a temporary injunction granted. (Rec. p. 26.)

Under these circumstances the Contract Company, being compelled to dispose of its bonds to continue its work, in order to be relieved of the injunction, surrendered all the bonds in its possession which had been guaranteed and had the endorsement canceled upon them; and such endorsement has been canceled upon all but $650,000 of the guaranteed bonds. Most of these are involved in this controversy and are in the hands of *bona fide* purchasers for value, and without notice.

At the time of the decision of the court on the plea to the jurisdiction and the granting of the temporary injunction, none of these *bona fide* holders were before the court, and no final decree was then entered. Afterwards a supplemental bill was filed setting up what had occurred on the original bill and bringing in these purchasers, or some of them. Answers were filed denying any allegations of fraud and alleging the purchase of the bonds in good faith and without notice of any defect.

As a matter of fact the fraud is disproved, but at any rate would have no effect upon the controversy with these purchasers. The real controversy with these purchasers arose out of the grounds asserted in the bill, as follows:

1. That the Company was solely a corporation of the State of Indiana, and that the laws of that State did not authorize the execution of the guaranty; that the law of Indiana provided that such a guaranty could not be made except upon the petition of the holders of a majority of the capital stock of the Company; that there had been no such petition, and that therefore the guaranty by the Board of Directors was *ultra vires* and void, even as to *bona fide* holders for value, and without notice.

2. That there was not a quorum of the Board of Directors when the resolution was passed authorizing the guaranty. This contention is disposed of by the stipulation on page 165 of Record, wherein it is stated that the guaranty was authorized by the Board of Directors, but not by the stockholders. It, therefore, may be eliminated from consideration.

The Circuit Court of Appeals held:

1st. That the corporation, while an Indiana corporation, was also a Kentucky corporation; that, as a Kentucky corporation, it was expressly authorized to guarantee the bonds in controversy; that, as to such guaranty, it bound all the property of the Company within the State of Kentucky.

2d. The Court held that it was also an Indiana corporation, and that under the statutes of Indiana it had corporate power to guarantee the Beattyville bonds, under the section ———, which authorized it upon the petition of stockholders; that this provision, requiring the petition of stockholders, related wholly to the inner management of the Company, and did not affect the *bona fide* purchasers for value.

3d. The Circuit Court of Appeals, however, neglected to consider a point, viz., that the statutes of Indiana authorized such a guaranty under two conditions:

(*a*) The guaranty might be made as a means of consolidating two companies, or of one company acquiring the controlling stock of another.

(*b*) They could guarantee the bonds of a company without any consideration of value, but for accommodation, when the company came within certain restrictions and a petition of the stockholders requested it.

The Circuit Court of Appeals for the Sixth Circuit decided the case entirely upon the hypothesis that it was one of the latter kind, that is, a guaranty for accommodation merely, and held that, being empowered to make such a guaranty upon the petition of stockholders, if such guaranty was made—though without the petition—it was valid in the hands of *bona fide* holders for value.

The Court, however, entirely overlooked the contention that, independent of this statute of accommodation, there were other provisions in the Indiana statutes which authorized a transaction of this kind. In other words, there is a clear distinction in these statutes between one which is made for value received, and one which is for accommodation. That is, the statutes of Indiana provide that one company may, in order to acquire another or the controlling interest in another, purchase the stock of such other or consolidate with it, and may for such purpose guarantee the bonds of the other company.

The careful and painstaking statement of facts made by the Circuit Court of Appeals, and the elaborate discussion of the question in the opinion of that Court (Record page——, and reported in 75 Fed. R. 433), render unnecessary any detailed statement of the facts or lengthy argument in behalf of the Louisville Trust Company. It is conceived, however, to be essential to call attention to some particular points, and especially to one contention which was not passed upon by the Circuit Court of Appeals.

I.

The New Albany Company, Although a Corporation of the State of Indiana, was Also a Corporation of the State of Kentucky.

If so, it was especially authorized by the law of the latter State to guarantee the payment of bonds issued by any other railway company in Kentucky. The words of the act approved April 8, 1880, are, that such New Albany Company was authorized and empowered

> "to endorse or guarantee the principal and interest of the bonds of any railway company now constructed, or to be hereafter constructed, within the limits of the State of Kentucky."

The Act of April 8, 1880, expressly provided in the title that it was "an act to incorporate the Louisville, New Albany & Chicago Railway Company," and provided that such corporation, "organized under the laws of the State of Indiana, is hereby constituted a corporation, with power to sue and be sued, to contract and be contracted with, and to have and use a common seal, with the power incident to corporations, and authority to operate a railroad." It was given authority to build connecting lines, and for the purpose was given the benefit of the power of condemnation.

It can no longer be denied that the corporation of one State may be at the same time a corporation of another, and this, indeed, happens whenever the corporations of two States become consolidated into one company.

Railroad Co. v. Harris, 12 Wall. 65;
R. R. Co. v. Vance, 96 U. S. 450;
Clark v. Bernard, 108 U. S. 436;
Graham v. R. R. Co., 118 U. S. 161;
R. R. Co. v. Robinson, 65 F. R. 592.

In R. R. Co. v. Harris, the Supreme Court said:

> "Nor do we see any reason why one State may not make a corporation of another State, as they are organized and conducted, a corporation of its own *quo ad hoc* its property within its territorial jurisdiction."

In Railroad Company v. Vance, the Court said:

> "But it may be suggested that the utmost which can be claimed for the act is, that without creating a new corporation in Illinois it only made the complainant, as an Indiana corporation, a corporation of the State of Illinois. It was clearly competent for the General Assembly to have done this."

In Memphis R. R. Company v. Alabama, 106 U. S. 585, the Court said:

> "The defendant, being a corporation of the State of Alabama, has no existence in this State as a legal entity or person, except under and by force of its incorporation by this State; and although also incorporated in the State of Tennessee, must, as to all its doings within the State of Alabama, be considered a citizen of Alabama, which can not sue or be sued by another citizen of Alabama in the United States Courts."

In Martin v. Baltimore & Ohio R. R., 151 U. S. 673, the opinion by Mr. Justice Gray reviews the subject, and it was decided that the Baltimore & Ohio R. R. Company was a Maryland corporation, and might also have been a corporation of Virginia, but the statute of that State did not suffice to constitute it a corporation of such State.

II.

The Kentucky Corporation Exists, or Continues to Exist, Notwithstanding the Consolidation of the Indiana Corporation with an Illinois Corporation.

It was contended that after the passage of the acts incorporating the Company in Kentucky, the Indiana corporation entered into a consolidation with the Chicago & Indianapolis Railway Company, and in which consolidation the Kentucky corporation did not join, and that the effect of this was to destroy the separate existence of the Indiana corporation, and consequently that of the Kentucky corporation. What became of the title to the property that the Kentucky corporation had acquired by condemnation nowhere appears. No precise argument is made upon the subject, but the contention is that the Kentucky corporation was lost in the shuffle.

It is reported that Justices Jackson and Brewer were of this opinion, but there is no record of the fact.

The contention, however, would seem to be ineffectual at the present time. The pretended consolidation took place in 1881,

and the effect of an attempt at such consolidation came before the Supreme Court of Illinois in a case where a corporation of that State undertook to consolidate with a corporation of an adjoining State. It was, after mature consideration, in an elaborate opinion held by that tribunal that there was no law of the State of Illinois prior to 1883 which authorized any such consolidation, that the attempt was nugatory and absolutely void, and that, as to property in Illinois, the mortgage executed by the Consolidated Company, and the bonds issued thereunder, were invalid and of no effect. It was held that such corporation was not even one *de facto*, because there could be none such *de jure*. (American Loan & Trust Co. v. Minnesota Co., 157 Ill. 741; 47 N. E. Rep. 153.)

As the consolidation with the Illinois corporation was void, the Indiana corporation must have retained its existence, and therefore remains as it was before—a corporation also of the State of Kentucky.

III.

BUT, IF A CORPORATION OF THE STATE OF INDIANA ALONE, GUARANTY OF THE BONDS WAS AUTHORIZED BY THE STATUTES OF THAT STATE AS A MEANS OF ACQUIRING THE KENTUCKY RAILWAY.

The statutes of Indiana which authorized this are as follows:

3951. PURCHASE AND CONSOLIDATION OF BRANCH ROADS. Any railroad company incorporated under the provisions of this act shall have the power and authority to acquire, by purchase or contract, the road, roadbed, real and personal property, rights and franchises of any other railroad corporation or corporations which may cross or intersect the line of such railroad company, or any part of the same, or the use and enjoyment thereof, in whole or in part; may also purchase or contract for the use and enjoyment, in whole or in part, of any railroad or railroads lying within adjoining States; *and may assume such of the debts and liabilities of such corporations as may be deemed proper.* Upon

purchasing any such railroad or railroads all the real and personal property of such corporation so purchased, and also the rights, powers, and franchises of the same, shall become vested in the railroad company so purchasing the same, together with all the rights, powers, privileges, and franchises conferred by the charters of the roads so purchased and all amendments thereto and the provisions of this act: and the company so purchasing and acquiring the title to or use of such railroad or railroads shall have power to complete, maintain, and operate the same. Any railroad company incorporated under the provisions of this act shall also have power to consolidate with other railroad corporations in the continuous line, either within or without this State, upon such terms as may be agreed upon by the corporations owning the same; and also shall have the power and authority to construct, equip, maintain, and operate branch railroads leading from the main line or from the termini of such railroad, from and to such points within this State or any adjoining State as may be deemed expedient; and in constructing the same shall have the right to enter in and upon all lands; to survey routes; to receive donations of lands or moneys; to purchase and condemn lands required for the use of the road; to lay single or double tracks, and to cross all water-courses and public highways, not unnecessarily obstructing the same. In condemning lands for the use of such roads it shall have all of the rights and powers conferred upon such corporations by their charters and amendments and the general laws of this State. All railroads purchased and branch roads constructed, as aforesaid, shall be vested in and become a part of the property of the corporation so purchasing or constructing the same, as aforesaid; and shall be in all things governed by the laws, rules, and regulations governing the corporation purchasing or constructing the same, as aforesaid, and be operated as part of its line of road. Upon purchasing or constructing any railroad, as hereinbefore provided, the corporation purchasing or constructing the same shall have power and authority to issue new stock to such extent as may be considered advisable, and the same to dispose of as hereinbefore provided; to issue and sell bonds to such extent as may be deemed expendient, and to secure the same by mortgages and deeds of trust upon all the real and personal property, rights, powers, and franchises of any railroad so purchased, constructed, or in course of construction, as hereinbefore provided: *Provided*, That the provisions of this act shall not be so construed as to authorize any railroad company organizing under the same to consolidate with or acquire, by contract or purchase, the road, roadbed, real and personal property, rights, and franchise of

any railroad already built, equipped and operated within the State of Indiana, and which may cross or intersect the line of the road of any company organizing under this act; but the powers of consolidation and purchase shall be and are hereby limited and restricted to such roads within the State of Indiana as may cross and intersect the same, and which have not been equipped and operated in whole or in part.

Provision is also made for the consolidation of Indiana companies with railroads in adjoining States, and for extensions by an Indiana company into or through any other State, as follows (in force February 23, 1853):

3971. POWER TO CONSOLIDATE GENERALLY. Any railroad company heretofore organized under the general or special laws of this State shall have the power to intersect, join, and unite its railroad with any other railroad constructed or in progress of construction in this State or in any adjoining State, at such point on the State line or at any other points as may be mutually agreed upon by said companies; and said railroad companies are authorized to merge and consolidate the stock of the respective companies, making one joint stock company of the two railroads thus connected, upon such terms as may be by them mutually agreed upon, in accordance with the laws of the adjoining State with whose road or roads connections are thus formed: *Provided*, their charters authorize said railroads to go to the State line or to such point of intersection.

3972. EXTENSION THROUGH OTHER STATES. Any railroad company heretofore organized or which may hereafter be organized under the general or special laws of this State, for the purpose of constructing a railroad from any point within this State to the boundary line thereof, is hereby empowered to extend said railroad into or through any other State or States, under such regulations as may be prescribed by the laws of such State or States into or through which said road may be so extended; and the rights and privileges of said company over said extension in the construction and use of said railroad for the benefit of such company, and in controlling and applying the assets of such company, shall be the same as if its railroad had been constructed wholly within this State.

The Court will observe the great liberality in the foregoing statutes, authorizing them both to purchase and to consolidate with connecting roads within adjoining States, and for such pur-

pose to assume such of the debts and liabilities of other railway corporations as might be deemed proper.

The right to purchase or contract for the use and enjoyment, in whole or in part, of any railroad lying within an adjoining State, and the right to consolidate with any such corporation, implies the right to use all means to accomplish the purpose which are usual or necessary.

Tod v. K. U. Land Co., 57 Fed. R. 47;
Dewey v. Toledo, 51 N. W. Rep. 1063;
Atchison v. Fletcher, 35 Kan. 236.

Section 3951 has been so interpreted by the Supreme Court of Indiana. There, the Local Trade Railway Company had purchased a large amount of the capital stock of the Cincinnati, Rockport & Eastern Railway Company, and certain of its stockholders filed a bill to set aside the purchase on the ground that one corporation was not authorized to acquire the stock of another. But the Supreme Court held that, as the Railway Company was authorized to purchase the property itself, or to consolidate its stock with that of the other company, it was also authorized, as a means to attain the end, to become the purchaser of the stock of such other Company; and sustained the validity of the transaction.

Hill v. Nisbet, 100 Ind. 341.

In this case, for the purpose of acquiring the use and control of the Beattyville Railroad, the New Albany Company undertook to acquire three fourths of its capital stock, and in consideration thereof agreed to guarantee the payment of the bonds issued by the Beattyville Company. The transaction is fully authorized by the above statutes. The Circuit Court of Appeals overlooked this contention, and based its decision upon a different statute. But it is, with due deference, submitted that the statutes above quoted authorize the transaction complained of.

It was said, many years ago, by the Supreme Court, in a case of a similar guaranty:

> "It is proved that it is a common practice for railroad corporations to make similar arrangements to enlarge their connections and increase their business."

Zabriskie v. Cleveland R. R., 23 Howard 381.

To the same effect is Ellsworth v. St. L. R. R., 98 N. Y. 533.

It is submitted that, under these statutes and the construction put upon them in Hill v. Nisbet, the guaranty was fully authorized, and is a binding obligation of the obligor company.

IV.

The Guaranty was Further Authorized by Statute of Indiana, and Might be Made Even for Accommodation.

This statute is as follows:

3951*a*. The Board of Directors of any railway company organized under and pursuant to the laws of the State of Indiana, whose line of railway extends across the State in either direction, may, upon the petition of the holders of a majority of the stock of such railway company, direct the execution by such railway company of an indorsement guaranteeing the payment of the principal and interest of the bonds of any railway company organized under or pursuant to the laws of any adjoining State, the construction of whose line or lines of railway would be beneficial to the business or traffic of the railway so indorsing or guaranteeing such bonds.

3951*b*. Petition of Stockholders. 2. The petition of the stockholders specified in the preceding section of this act shall state the facts relied on to show the benefits accruing to the company indorsing or guaranteeing the bonds above mentioned.

3951*c*. Limitation of the Power. 3. No railway company shall, under the provision of this act, indorse or guarantee the bonds of any such railway company or companies, as is above mentioned, to an amount exceeding one half of the par value of the stock of the railway company so indorsing or guaranteeing as authorized under this act.

It will be observed that this statute does not require that there be any consideration for the guaranty. It provides:

1st. That the Board of Directors of the Railway Company may direct the guaranty of the principal and interest of the bonds.

2d. It must be upon the bonds of a company, the construction of whose line or lines of railway would be beneficial to the business or traffic of the railway company guaranteeing the bonds.

3d. It must be upon the petition of the holders of a majority of the stock of such company.

4th. The petition of the stockholders must state the facts relied on to show the benefits accruing to the guaranteeing company.

5th. The amount of bonds guaranteed shall not exceed one half the par value of the stock of the guaranteeing company.

The distinction between the guaranty authorized by this statute and that authorized by the other statutes quoted above is very marked, and was evidently intended to apply to cases other than those covered by the previous statutes; in fact, it was intended to extend the power even to cases where no consideration was to pass between the parties.

It is stipulated in this case that the Board of Directors duly authorized the indorsement of the guaranty, which is as follows:

> "For value received, the Louisville, New Albany & Chicago Railway Company hereby guarantees to the holder of the within bond the payment by the obligor therein of the principal and interest thereof, in accordance with the tenor thereof.
>
> "In witness whereof, the said Railway Company has caused its corporate name to be signed hereto by its President, and its seal to be attached by its Secretary."

And it was so signed, and the seal was so attached and attested.

It is also stipulated that no petition by the stockholders was presented to the Board of Directors, requesting the guaranty.

The bonds with the indorsement of guaranty were put upon the market and sold, and those now in controversy are held by

bona fide holders for value, and without notice that such petition was not presented. The power of the corporation to make the guaranty is not disputed. The want of the petition of the stockholders does not affect the corporate power.

It will be observed that no meeting of the stockholders was required, nor was there to be any official or technical act on their part. The petition was one which was to be signed by individual stockholders, without any meeting or any action on their part as a body. There was, therefore, no necessity or reason for the records of the Company to set forth such a petition. It was the Board of Directors who were to act when such petition had been presented, and they, therefore, were to determine whether or not it had been presented, and whether or not the signers were stockholders, and whether or not they constituted a majority thereof, and whether it did or did not set forth the benefits which were to accrue. What proceedings might be taken by the directors might or might not appear upon their minutes, but such minutes are not public records, and convey no notice to the outside world. It is not within the power, nor is it within the duty, of a purchaser of negotiable bonds to have knowledge of what appears on the records of a private corporation.

Mr. Justice Brewer said, in the case of Blair v. The St. Louis R. R. Co., 25 Fed. R. 684:

> "I do not understand that a man dealing with a private corporation, or even a quasi-public corporation like a railroad, is bound to take notice of what the records of that corporation show, for if it be so, no man can deal with a corporation in safety without first having access to and an examination of its books, and the converse of that would be true, that such a corporation is bound to show its records to whosoever has dealings with it."

Nor is the Board of Directors an agent of the corporation in the ordinary meaning of the term, nor are their powers governed by the law of agency. They are constituted by law the governing body of the Company, and are entrusted with the conduct of

its affairs. It has the power to make all lawful contracts; it may issue bonds, execute mortgages, and do all acts which arise in the ordinary management of the corporate affairs and which the corporation is authorized to perform.

Beveridge v. N. Y. R. R., 112 N. Y. 1;
Louisville R. R. v. McVay, 98 Ind. 391;
Flagg v. Manhattan, 10 Fed. R. 413;
1st Waterman on Corp., Sec. 124.

V.

WHERE THERE IS POWER IN A CORPORATION TO ACT, THERE IS NO QUESTION OF ULTRA VIRES. IF THE POWER HAS BEEN IRREGULARLY EXERCISED BY CORPORATE OFFICERS, THE QUESTION IS ONE OF THE GENERAL LAW GOVERNING NEGOTIABLE INSTRUMENTS. IN SUCH CASE THE BONA FIDE HOLDER FOR VALUE WITHOUT NOTICE MAY ENFORCE A NEGOTIABLE OBLIGATION.

If commercial instruments are to be subject to such defenses as are contended for in this case, the use and value of such instruments would be almost destroyed. It will be noted that if the purchaser of a bond must take notice whether or not a petition had been filed, he must also take notice that it has been signed by persons who are stockholders in the company, and that they hold sufficient stock to constitute a majority. A petition not so signed would have no more effect than if there were no petition. As a practical question, how could a purchaser obtain such information, and must he take a negotiable instrument at the peril of his having been misinformed? In the vast number of cases where railroad mortgages have been executed, and where the law requires that it should be done by a vote of the majority of the stockholders, is it true that the purchaser of the bond in open market can be defeated by evidence that the stockholders voting for the measure did not constitute a

majority? It would seem that such a principle would take away the whole foundation of the faith and credit which is given to such securities. The general doctrine established by the decisions is inconsistent with such a position:

> "Where a party deals with a corporation in good faith (the transaction is not *ultra vires*) and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists.
>
> "If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them."

Merchants Bank v. The State Bank, 10 Wall. 644.

Again, in another case:

> "A contract of a corporation which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that *it could not make it.* The contract can not be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.
>
> "When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing law, neither the corporation nor the other party to the contract can be estopped by assenting to it or by acting upon it to show that it was prohibited by those laws." (Central Transp. Co. v. Pullman, 139 U. S. 59.)

More important still is the decision in the case of the St. Louis Railroad v. The Terre Haute Railroad, 145 U. S. 393. In that case the Illinois statute declared as follows:

> "It shall not be lawful for any railroad company of Illinois to consolidate their road with any railroad out of the State of Illinois, or to lease their road to any railroad company out of the State of Illinois, *without having first obtained the written consent of all of the stockholders of said roads residing in the State of Illinois*, and any contract for such consolidation or lease which may be made without having first obtained said written consent, signed by the resident stockholders in Illinois, shall be *null and void*."

The Supreme Court decided that this provision was enacted solely for the protection of the stockholders, and that it was not a limitation upon the scope of the corporate powers, and consequently it could be ratified or made good by estoppel. On this subject the Court said:

> "Although this statute in terms declares that any such lease, made without the written consent of the Illinois stockholders, 'shall be null and void,' it would seem to have been enacted for the protection of such stockholders alone, and intended to be availed of by them only. It did not limit the scope of the powers conferred upon the corporation by law, an excess of which could not be ratified or be made good by estoppel; but only prescribed regulations as to the manner of exercising corporate powers, compliance with which the stockholders might waive, or the corporation might be estopped, by lapse of time, or otherwise, to deny." Citing:

Zabriskie v. Cleveland, &c., R. R., 23 How. 381, 398;
Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24, 42, 60;
Davis v. Old Colony R. R., 131 Mass. 258–260;
Beecher v. Marquette & Pacific Co., 45 Mich. 103;
Thomas v. Citizens' Railway, 104 Illinois, 462.

This case is based upon the fundamental distinction which was maintained by the Circuit Court of Appeals between those acts which are *ultra vires* because prohibited by reason of public policy

and which can not be made valid by acquiescence or estoppel, and those other acts which are within the general powers of the corporation but which are limited or regulated solely for the benefit of the stockholders themselves. In the latter case the stockholders may ratify what has been done. If the contract be executed upon the other side, the company is estopped to plead want of power. In all such cases where to sustain the plea of want of power would produce injustice, it will not be allowed.

The distinction is very clearly stated in the case of Ditch Co. v. Zellerbach, 37 Cal. 543, in which Justice Sawyer says:

> "The term *ultra vires*, whether with strict propriety or not, is also used in different senses. An act is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it under any circumstances or for any purpose. An act is also sometimes said to be *ultra vires* with reference to the right of certain parties, when the corporation is not authorized to perform it without their consent; or with reference to some specific purpose, when it is not authorized to perform it for that purpose, although fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose; and the rights of strangers dealing with corporations may vary according as the act is *ultra vires* in one or the other of these senses. All these distinctions must be constantly borne in mind in considering the question arising out of dealings with a corporation. When an act is *ultra vires* in the first sense mentioned, it is generally, if not always, void *in toto*, and the corporation may avail itself of the plea; but when it is *ultra vires* in the second sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case."

The same distinction is drawn in the following cases:

Hervey v. Railway Co., 28 Fed. R. 169;
Cambell v. Argenta Mining Co., 51 Eed. R. 1;
Wood v. Corry Water Works Co., 44 Fed. R. 146;
Wright v. Pipe Line Co., 101 Pa. St. 204;
Union Pacific Railroad Co. v. Chicago Railway, 51 Fed. Rep. 309.

The same principle is established in the law of England. The discussion of the English authorities in the opinion of Judge Taft is so thorough and complete as to render unnecessary any review of them here.

Bank v. Turquand, 6 El. & Bl. 327;
Mahony v. Mining Company, L. R. 7 H. L. 869.

The attention of the Court is called to the distinction between powers of municipal corporations and of business corporations. The principles which underlie the right to enforce the obligation in the one class of cases is entirely unlike that in the other. There is a presumption, in the case of a municipal corporation, that it has no power to issue negotiable instruments (Brenham v. German Am'r Bank, 144 U. S. 173). But, on the other hand, the corporation engaged in business is presumed to have the power to issue negotiable paper. While a municipal corporation can only act through public officers, whose doings are matters of public record, it may well be maintained that there is the duty—as well as the right—to investigate and ascertain the basis of the acts of the municipal officers. But, in the case of private corporations, there is neither the right nor the duty to examine into its private records. The authorities, therefore, which refer to municipal securities are based on very different doctrines from those which govern in the case of business corporations, and are therefore not of value in reaching a conclusion in the latter case.

ST. JOHN BOYLE,
Counsel for Louisville Trust Company.